No. 510.

SAMUEL H. STONE, AUDITOR, CHARLES FINLEY, SECRETARY OF STATE, AND GEORGE W. LONG, TREASURER OF THE COMMONWEALTH OF KENTUCKY, AND CITY OF LOUISVILLE, APPELLANTS,

vs.

THE BANK OF COMMERCE.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF KENTUCKY.

FILED AUGUST 18, 1898.

(16,947.)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1898.

No. 362.

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1 Proceedings of the circuit court of the United States for the district of Kentucky, at a regular term begun and held at the Federal court hall, in the city of Louisville, on Monday, February 21st, 1898.

Present: Honorable John M. Harlan, circuit justice, and Honorables Wm. H. Taft and H. H. Lurton, circuit judges.

BANK OF COMMERCE, Complainant,
vs.
SAMUEL H. STONE ET AL., Defendants.

Be it remembered that heretofore, to wit, on the 17th day of April, 1897, came the complainant, by counsel, and filed in the clerk's office of our said court its bill of complaint against the above-named defendants.

The bill of complaint above referred to is as follows:

2 To the judges of the circuit court of the United States for the sixth circuit and district of Kentucky:

Bank of Commerce, a citizen and resident of the State of Kentucky, brings this bill against Samuel H. Stone, Charles Finley and G. W. Long, citizens and residents of the State of Kentucky, and the City of Louisville, a municipal corporation of said State of Kentucky; and thereupon your orator complains and says that it is a corporation duly chartered and organized under the laws of the Commonwealth of Kentucky by an act of the General Assembly of said Commonwealth, entitled "An act to incorporate the Western Financial Corporation," approved on the 10 day February, 1865; and your orator has all the powers granted by said charter and the several amendments thereof, among which is the power to contract, and to sue and be sued. Said amendments were adopted. March 2, 1865; Feb'y 15, 1869; Feb'y 27, 1882, and March 8, 1884. By this last act the name was changed from the Western Financial Corporation to the "Bank of Commerce."

Your orator says it is and has been since its organization *been* engaged in the banking business in the city of Louisville, Kentucky. The defendant Samuel H. Stone is the auditor of public accounts for the Commonwealth of Kentucky, the defendant Charles Finley is the secretary of state, and the defendant George W. Long is the treasurer of the State, all of them having been duly elected to their respective offices, and having qualified as provided by law.

The defendant The City of Louisville is a municipal corporation deriving all its rights and powers from a statute law of Kentucky duly passed for the government of cities of the first class.

Par. 2. Your orator shows that prior to the passage of the revenue law by the General Assembly of the Commonwealth of Kentucky, approved May 17, 1886, known as the "Hewitt bill," the law of said Commonwealth governing the taxation of banks was very unsatisfactory in this: to wit, that there were four banks chartered by said State prior to the year 1856, which held charter contracts beyond

the power of the State to repeal. Said banks are hereafter referred to as the old banks. These banks had a large capital and divers branches, and came into immediate and direct competition with the other banks of the State. The court of appeals of Kentucky, the court of final resort in that State, had several times construed said contracts and held that they were beyond the power of legislature to repeal. By their said contracts with the State each of these banks could discharge itself of all taxation—State and local, such as county, city and district—by the payment of fifty cents on each share of its stock of the par value of $100, and this payment of fifty cents on each share of stock the Commonwealth was by its contract bound to receive in full payment of its claim for taxation upon all the different kinds of property of said bank.

In addition to this complication with the old banks, the national banks in the State were claiming the right to be put upon a footing as to taxation upon an equality with the four old banks, and as the capital of the four old banks was about equal to the combined capital of all the other State banks, the courts of Kentucky had held that they could not be subjected to a heavier burden of taxation.

No other bank in the State could be taxed at a materially higher rate without practically driving it out of business, as it would thereby be unable to compete with the said four old banks and the national banks, and for this reason by express provisions of the respect-
3 ive charters granted by the State, as by the general law, all the banks and other institutions of loan or discount were taxed at the same rate as the old banks and national banks. The State being dissatisfied with the existing tax rate against the banks and similar corporations desired to increase the rate, but much desired, for the reason above referred to, to have the tax rate on all the banks in the State uniform, which could only be done by exempting them from local taxation and increasing their tax to the State. And as it was not within the power of the State to increase the tax rate against the old banks except with their consent, they were asked in the interest of uniformity to consent, and, in the interest of uniformity and to secure to the banking interests in the State repose on the tax question for the remainder of their respective charter lives, the old banks did consent in the manner hereafter described to the scheme of taxation hereafter more particularly described. Accordingly the General Assembly of the Commonwealth of Kentucky, as a part of its revenue bill, entitled, "An act to amend the revenue laws of the Commonwealth of Kentucky," approved May 17, 1886, enacted provisions concerning the taxation of banks substantially as follows:

1st. It declared that the shares of stock in State and national banks, and other institutions of loan or discount, and in all corporations required by law to be taxed on their capital stock, shall be taxed seventy-five cents on each share thereof equal to one hundred dollars, or on each one hundred dollars of stock therein owned by individuals, corporations, or societies, and said banks, institutions, and corporations, shall, in addition, pay upon each one hundred

dollars of so much of their surplus, undivided surplus, undivided profits, or undivided accumulations as exceeds an amount equal to ten per cent. of their capital stock, the same rate of taxation that is assessed upon real estate, which shall be in full of all tax, State, county and municipal. For the purpose of ascertaining such surplus, undivided profits, or undivided accumulations, it is provided that the auditor might at his option investigate the books of the bank, institution or corporation. And it is further provided that any officer having in charge the affairs of such bank, institution, or corporation who shall refuse, when duly called upon, for the purpose, to allow his books to be investigated, shall be subject to indictment in the Franklin circuit court, or the circuit court of the county wherein said bank, institution or corporation shall be located, and, upon conviction, shall be fined not less than five hundred dollars and not more than one thousand dollars.

It is further provided that the cashier of the bank, and the treasurer of any other institution or corporation, whose stock is taxed, shall, on the first day of July in each year, report to the auditor of public accounts the true amount of the capital stock, and the true amount of surplus, undivided profits, or undivided accumulations, and how or in what said surplus, undivided profits, or undivided accumulations *is* invested, and pay into the treasury the amount of tax due.

It is further provided that if such tax be not paid, the cashier and his sureties shall be liable for the same and twenty per cent. upon the amount, and any State bank, institution, or corporation shall thereby forfeit the privilege of its charter.

The fourth section of said act is as follows:

"That each of said banks, institutions, and corporations, by its proper corporate authority, with the consent of a majority in interest of a quorum of its stockholders, at a regular or called meeting thereof, may give its consent to the levying of said tax, and agree to pay the same as herein provided, and to waive and release all right under the acts of Congress or under the charters of the State banks to a different mode or smaller rate of taxation, which consent or agreement to and with the State of Kentucky shall be evidenced by writing under the seal of such bank and delivered to the governor of this Commonwealth, and upon such agreement and consent being delivered, and in consideration thereof, such bank and its shares of stock shall be exempt from all other taxation whatsoever so long as said tax shall be paid during the corporate existence of such bank."

By the fifth section it is declared that said banks may take the proceeding authorized by section 4 of this act at any time until the meeting of the next General Assembly; provided, they pay the tax provided in section 1 from the passage of this act. Said act also provides in effect that said banks accepting the provisions of said bill shall pay taxes for municipal and county purposes on any real estate or building owned and used by said banks or corporations for conducting their business.

Your orator further shows that thereafter within the time al-

lowed by said act, to wit, during the year 1887, and before the meeting of the next General Assembly, it caused the question of the acceptance or non-acceptance of the State's proposition to be submitted to a quorum of its stockholders duly assembled for the purpose of considering said question; and after due consideration its stockholders, representing more than a majority of all its stock outstanding, consented to the levying of said tax, and agreed to pay the same as in the said law provided, and to waive and release all its rights under its charter to a different mode or a smaller rate of taxation, and said consent and agreement to and with the State of Kentucky was evidenced by writing under the corporate seal of your orator, which was delivered to the governor of the Commonwealth, and
4 from that time thenceforward continuously to the present time your orator regularly and promptly paid its taxes each year in accordance with and as provided by its said contract, except as hereinafter explained.

Your orator through its cashier made its report in accordance with said law, and paid into the State treasury on the first day of July, 1887—the said law not having gone into effect until September 14, 1886—the full tax required by said act, and in conformity with said act has made its report in proper form to the auditor of public accounts on the first day of July in each and every year up to this time.

Your orator shows that in July, 1893 and 1894, it made its report as usual to the auditor of public accounts in the manner prescribed by the act of May 17, 1886, known as the "Hewitt bill," and tendered the amount of the tax due thereunder, to wit, seventy-five cents on each share of its capital stock equal to one hundred dollars, and also in accordance with said act tendered to said auditor the taxes at the current rate, then assessed upon real estate, upon so much of its surplus, undivided surplus, undivided profits or accumulations as exceeded an amount equal to ten per cent. on its capital stock, but said auditor refused to accept the money so tendered, or to receive any more than the current rate of forty-two and one-half cents on the hundred dollars on the valuation fixed by the State board of valuation and assessment provided for in the act of November 11, 1892, hereafter more particularly set out. The amount so demanded by the auditor your orator paid under protest.

Afterwards on the 1st day of June, 1895, the court of appeals of Kentucky decided in favor of the banks the litigation hereinafter mentioned, and thereafter the auditor of the State demanded from your orator and each of the other banks in the State, for the years 1893 and 1894 the difference between what had been paid under the act of November 11, 1892, and what should have been paid under the act of May 17, 1886, known as the "Hewitt bill;" and your orator promptly complied with said demand and paid said difference into the treasury of the State, and for the years 1895 and 1896 your orator made report and payment under the "Hewitt bill" and in accordance with its provisions; and so it is that your orator respectfully shows that it has regularly since and including 1887, and up to the present time, reported to the auditor in the manner provided

by said act of May 17, 1886, and has regularly, and within the prescribed time paid its taxes thereunder, except, and for the causes mentioned, during the period above described. Your orator shows that it did not until Feb'y, 1894, own the building in which it did business, and since that date it has regularly each year paid its taxes to the city of Louisville.

Your orator respectfully shows and submits to this honorable court that the act hereinbefore specifically set out, adopted by the General Assembly of Kentucky on the 17th of May, 1886, and your orator's formal acceptance thereunder as provided by said statute, and your orator's payment thereunder and in accordance therewith to the State of a sum much in excess of that paid by individuals to the State on the same kind of property, and the acceptance thereof by the State, constituted a contract between the State on the one part and your orator and its stockholders upon the other part, continuing during the legal existence of your orator's corporate life, and the State was equally with your orator bound thereby, and had no right to retire therefrom.

Par. 3. Your orator respectfully shows that notwithstanding the contract thus formally entered into, and which it was agreed should subsist during the charter life of your orator, the State of Kentucky on the 11th of November, 1892, unmindful of its contract obligations with your orator and others, through its General Assembly undertook to tax all of the banks in the State in a manner different from that prescribed in the contract hereinbefore set out, and also to subject them to all manner of local taxation, the total tax for State and municipal purposes thus provided for being very much more onerous than the tax provided for under the "Hewitt bill" approved May 17, 1886. As applied to your orator the tax under the act of November 11, 1892, before referred to will exceed the tax which it would have to pay under the "Hewitt bill" by $20,000.00. The particular method of assessment and taxation prescribed in the act of November 11, 1892, and now attempted to be enforced, will be hereafter more at length set out.

Par. 4. Your orator shows that early in the year 1894, and before the 4th of May, 1894, the defendant, The City of Louisville, claiming to act under the authority of the statute governing cities of the first class, and of its ordinances adopted in pursuance thereof, demanded of your orator and of every other bank and trust company in the city of Louisville, a tax equal to four per cent. of its gross receipts, and this demand being refused, legal proceedings were commenced in the city court of Louisville in behalf of the city against all of said banks and trust companies, including your orator. At that date the tax upon the gross receipts of the banks, if enforceable, was payable to the sinking fund of the city of Louisville, and with a view of embarrassing the sinking fund of the city as little as possible, the banks, through their committee, held a meeting with the commissioners of the sinking fund, and it was agreed between the city of Louisville and its sinking fund commissioners upon the one part and the banks and trust companies of the city of Louisville, including your orator, upon the other, that pending the litigation

which by the agreement was to be inaugurated, and without prejudice to the right of the banks, they would make payments and loans to said sinking fund as follows:

First. The sinking fund was to accept from each of said banks and trust companies a payment equal to the difference between the amount which the banks and trust companies would have to pay to the State under the present law and the amount which they would be required to pay for State taxes under the provisions of the "Hewitt bill." This sum it was provided should be an actual payment and not be repaid under any circumstances, but its payment was not in any manner, or to any extent to prejudice the banks or trust companies paying it, or be taken as a waiver of any legal right which they might have in the premises.

Second. In addition to making the above payments the banks and trust companies, save those which were to be selected to test the question involved, should each lend to the sinking fund a sum which added to said payment would equal four per centum of its gross earnings during the year 1893, and the sinking fund would execute for said loans its obligations agreeing to repay the same with interest at four per centum per annum, when, and if, it should be finally adjudged by the court of last resort that said banks or trust companies were not liable to pay the license fee, required by the ordinance aforesaid, but if it should be finally adjudged that they were liable to pay said license fee, then said loan should be taken and deemed as a payment of said license fee, and the obligation to repay same should be void.

Third. It was agreed that the banks or companies selected to test the questions involved would each lend the sinking fund a sum equal to four per centum of the gross earnings for the year 1893, and would receive therefor the obligations of the sinking fund as above described.

Fourth. It was further agreed that that arrangement was entered into with the understanding that the banks and companies would institute without delay, and diligently prosecute such actions as might be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund would not prosecute them or any of them for doing business without license.

The substance of this agreement was spread at large upon the records of the sinking fund, and a copy thereof is filed herewith as part hereof, marked A.

As further *evidence* of the contract at that time made between the City of Louisville and its sinking fund, and the various banks and trust companies, including your orator of the city, it was agreed in writing by said parties in substance that in order to effectually test the question as to all of said banks and trust companies they were divided into three classes, it being understood that all who accepted the provisions of the said "Hewitt bill" would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It was understood that the trust and title companies which had accepted the provisions of the "Hewitt bill" would fall in class B above named.

It was further agreed that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the "Hewitt bill," that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes. And it was also agreed that if any bank of any class should succeed in establishing the contract and the validity thereof under the "Hewitt bill" that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the "Hewitt bill."

This agreement was signed by the president of the sinking fund, and by the attorney for the city under the authority and direction of the mayor and the board of sinking fund commissioners, and by the counsel who represented the banks in said litigation.

On the faith of this agreement as outlined in the resolution spread upon the records of the sinking fund, and more at large set out in the contract duly executed, the various banks and trust companies (including your orator) of the city of Louisville paid into the sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the minutes of the sinking fund commissioners heretofore referred to; and at a still later date, and in further reliance upon said agreement, the said banks and companies, including your orator, except those already involved in the test cases, paid the whole amount of the taxes claimed against them by the city of Louisville without reservation, until the question should be finally disposed of. This was done without prejudice to the rights of the banks and trust companies, and was not to be deemed a waiver by the banks or trust companies of any of their claimed rights, but was done to prevent confusion from coming into the management of the sinking fund, as the taxes against the banks claimed by the city had been transferred to the sinking fund of said city. It was agreed that these payments should not last longer than the final decision in favor of the banks if such decision should be rendered.

A copy of the contract aforesaid with the minute aforesaid is filed herewith as part hereof, marked A.

6 The amount paid by the banks and trust companies to the city under said agreement is over $150,000, no part of which has ever been refunded by said city.

Par. 5. Your orator further shows that with a view of testing every phase of the question so that the decision when rendered would determine the liability of every bank and trust company in the city of Louisville, three suits were brought pursuant to the contract aforesaid. The Bank of Kentucky, whose charter was granted prior to 1856, during which year a general law was adopted reserving the right to amend or repeal all charters or amendments thereafter granted unless a contrary intent was plainly expressed, brought suit in which it represented itself as the Bank of Louisville,

which also had a charter granted prior to 1856. The Louisville Banking Company had a charter from the State granted subsequent to the year 1856, but before the passage of the "Hewitt bill," and it brought a suit in which it represented all the banks and trust companies in the city whose charters were granted by the State since 1856; and the Third national bank also brought its suit, in which it represented all the national banks of the city.

In these suits each of the banks set up the adoption of the "Hewitt bill" with its various provisions, and the fact that each of them had assembled their stockholders to consider the question whether or not it would accept the provisions of the "Hewitt bill," and the further fact that the said stockholders, a majority of all of them acting in the affirmative, had accepted the provisions of the "Hewitt bill," and had certified the same to the governor, and had thereafter regularly made the reports and payments as provided for in the "Hewitt bill," and it was asserted in each case that the act of May 17, 1886, known as the "Hewitt bill," together with the action of each bank thereon accepting the same, constituted a valid and irrepealable contract, lasting during the charter life of each bank and that the action of the State in undertaking to subsequently tax the banks by a different method and in a more onerous way, was in violation of the Federal Constitution, which forbids a State *bank* from passing a law impairing the obligation of a contract. Such proceedings were had that the Jefferson circuit court adjudged that the Bank of Kentucky had a contract in the "Hewitt bill" which was irrepealable, but that the Louisville Banking Company and the Third national bank did not have, and the petitions of these two banks were each dismissed. From the judgment of the Jefferson circuit court the city of Louisville prosecuted its appeal against the Bank of Kentucky; and the Louisville Banking Company and the Third national bank each prosecuted its appeal against the city of Louisville. These suits, though really against the city of Louisville, were each brought against R. H. Thompson, judge of the police court of the city of Louisville, that being the method pointed out by the law governing cities of the first class, as a means of testing the validity of any city ordinance.

In the court of appeals, which is the court of final resort in the State of Kentucky, the city of Louisville was represented by its corporation counsel and the Commonwealth of Kentucky appeared by its attorney general and by oral argument and printed brief opposed the contention of the several banks. The city and the State through their respective official attorneys both insisted that none of the banks or trust companies had any contract under the "Hewitt bill," and that if they did have at one time, the State had a perfect right to retire from it under the sixth section of the article relating to banks, which declared that this "act shall be subject to the provisions of section 8, chapter 68, of the General Statutes."

The only questions which were submitted to the circuit court and the court of appeals, were—

1st. Whether or not the "Hewitt bill," coupled with the acceptance

thereof by the several banks and trust companies, and the payment of taxes thereunder, constituted a contract between the State and the several banks and trust companies.

2d. If it did, then what was the extent of the duration of that contract.

It was contended by the banks and trust companies, first, that they did have a contract growing out of the acceptance of the "Hewitt bill," and second, that the contract was irrepealable by the State and lasted throughout the corporate existence of the several banks and trust companies. These being the only questions involved, the court of appeals of Kentucky after a most elaborate argument, and the most thorough and painstaking consideration, determined and adjudged in accordance with the contention of the several banks and trust companies—

First. That the "Hewitt bill" and the acceptance thereof and the action thereunder by the banks did constitute a contract between the banks and the State, and,

Second. That this contract was irrepealable in its nature and lasted throughout the charter existence of the several banks and trust companies.

A complete transcript of the record in the case of the Louisville Banking Company *vs.* R. H. Thompson, Judge of — police court of the city of Louisville, is filed in this court with the bill of said bank against Sam'l H. Stone and others, and is now referred to and made a part of this bill.

7 Upon the issuing of said mandate in the cases of the Louisville Banking Company and Third national bank judgments were entered in the Jefferson circuit court, in pursuance to said mandate and the respective prayers of said petitions.

Certified copies of said orders are also filed with the transcript of the records in the cases above named. Wherefore your orator pleads and relies upon said former adjudication as a bar to any further claim by or on behalf of the city of Louisville against your orator for taxes except under and in accordance with said act of May 17, 1886, known as the "Hewitt bill."

Par. 6. Your orator further shows that by an act passed by the General Assembly of the Commonwealth of Kentucky on the 11th of November, 1892, it is provided in substance that every incorporated bank and trust company shall in addition to other taxes, imposed on it by law, annually pay a tax on its franchise to the State and a local tax thereon to the county, incorporated city, town and taxing district where its franchise may be exercised. The auditor, treasurer and secretary of state was by said act constituted a board of valuation and assessment for fixing the value of said franchise. It is further provided that in order to determine the value of the franchise the banks and trust companies shall each file reports on or before the first day of March in each year, which reports shall be made up and include the 31st day of the preceding December. These reports it is provided shall be verified by the president, cashier, secretary, treasurer or manager or other chief officer, in such form as the auditor may prescribe, showing the following facts, viz: The name and principal place of

business of the company; the amount of capital stock; the number of shares; the amount of stock paid up; the nominal and real value thereof; the highest price at which such stock was sold at a *bona fide* sale within twelve months next before the 15th day of September of the year in which the statement was required to be made; the amount of surplus funds, and undivided profits, and the value of all other assets; the total amount of indebtedness as principal; the amount of gross or net earnings or income, including interest on investments, the income from all other sources for twelve months next preceding the 15th day of September of the year in which the statement is required; the amount and kind of tangible property in the State, and where situated, assessed or liable to assessment in the State, and the fair cash value thereof, estimated at a price it will bring at a fair voluntary sale; and such other facts as the auditor may require.

Upon this information, and such other information as the board can obtain, it is authorized to fix the value, for purposes of taxation, upon the franchise of such banks and trust companies. It is further provided that the auditor of the State at the expiration of thirty days after the final determination of such values shall certify to the county clerk of the counties when any portion of the corporate franchise of such banks and trust companies shall be liable to local taxation, the amount thereof liable for county, city, town or district tax, and such certificate, it is provided, should by each county clerk be filed in his office, and be by him certified to the proper collecting officer of the county, city, town or taxing district for collection.

It is further provided that as to banks and trust companies their taxes assessed by the State board of valuation and assessments, as before described, shall be due and payable on the 1st of July succeeding such report.

It is further provided that in the event the banks and trust companies failed to make such report and pay such taxes, a penalty of ten per cent. on the amount of the tax shall attach, and thereafter such tax shall bear interest at the rate of ten per cent. per annum, and any bank or trust company failing to pay its taxes, penalties and interest after becoming delinquent, shall be deemed guilty of a misdemeanor, and on conviction shall be fined $50.00 for each day the same remains unpaid, to be recovered by indictment or civil action of which the Franklin circuit court shall have jurisdiction.

Your orator further respectfully submits to the court that this scheme of taxation contained in the act of November 11, 1892, above described, impairs the obligation of its contract, and is for that reason in violation of the provision of the Federal Constitution prohibiting a State from impairing the obligation of a contract. And your orator further submits that said scheme of taxation is also in violation of the 181st section of the constitution of the State of Kentucky, which declares that the "General Assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer on the

proper authorities thereof, respectively, the power to assess and collect such taxes."

Your orator respectfully shows that the tax which the City of Louisville claims the right to collect, and is threatening to collect from your orator has not been assessed by the said City of Louisville, but the assessment is required by the law to be made by the board of valuation and assessment, consisting of the defendants Stone, Finley and Long, acting in their capacities, respectively, as auditor, secretary and treasurer of the State.

Your orator says that this board thus constituted, will, unless, restrained by this honorable court, proceed to assess your orator in the manner pointed out by the act of November 11, 1892, when it has no lawful right to do so, and it will thereby cast a cloud upon
8 your orator's right to pay taxes under and in accordance with its contract, and the said auditor will, unless restrained, certify said assessment to the county clerk of Jefferson county, who will in turn certify the same to the tax collector of the city of Louisville, and said city will attempt to collect from your orator a tax in favor of said city upon said assessment, and thus your orator will be subjected to harassment and litigation.

And furthermore, your orator says that if said assessment be not restrained and is allowed to be made, the State of Kentucky will claim that unless your orator pays the taxes according to the said legal scheme for taxation devised by the State, that your orator is subject to a penalty of ten per cent., and that the taxes thereafter should carry ten per cent. per annum interest; and furthermore that your orator would be liable to a penalty of $50 a day for each day that the taxes, according to the said illegal scheme, remains unpaid. The result will be that unless restrained your orator will be improperly annoyed and harassed with litigation, and the value of its stock will be greatly impaired, and its stockholders injured by the suits instituted by the city and State in their attempt respectively to enforce as against your orator the taxes attempted to be imposed and penalties denounced, by the statute.

Your orator shows that the State taxes based on the assessment of your orator's franchise exceeds the sum of $2,000.00 exclusive of interest and cost, and the taxes claimed by the City of Louisville based on the assessment of your orator's franchise exceeds the sum of $2,000.00 exclusive of interest and cost.

Your orator respectively shows that the City of Louisville is insisting that the auditor of the State, the defendant, Samuel H. Stone, shall certify to the county clerk of Jefferson county the assessment illegally made, or to be made by the board of valuation and assessment, so that its tax collector may endeavor to enforce as against your orator and the other banks and trust companies in the city the taxes for city purposes, and your orator further shows that the said auditor of the State, Samuel H. Stone, has threatened to so certify said assessment, and will, unless restrained, certify said assessment for the various years 1895, 1896 and 1897 to the county clerk of Jefferson county, and said clerk will certify the said assessment to the tax collector of the city of Louisville.

To the end therefore that your orator may not be subjected to the false claims and suits which will be instituted by the city and State, and that it may be spared the irreparable injury which it will suffer, and that its property and its right of contract heretofore fully stated shall not be subjected to an illegal cloud, your orator prays for a writ of subpœna against the defendants, Samuel H. Stone, auditor; Charles Finley, secretary; George W. Long, treasurer of the State of Kentucky, and The City of Louisville to appear and make full and true answer to this bill (but not under oath, answer under oath being hereby waived) and that an injunction *pendente lite* be granted commanding the said Samuel H. Stone, Charles Finley and George W. Long to refrain from assessing or attempting to assess the franchise of your orator, or any of the property of your orator, and that the said Samuel H. Stone be restrained from certifying any assessment which has been or may be made of the franchise or property of your orator to the county clerk of Jefferson county, or any other officer, and that the defendants including The City of Louisville and each of them be restrained from collecting or attempting to collect any taxes based upon said illegal assessment, whether due to the State of Kentucky or to the City of Louisville, until the final order and determination of this court, and that upon such final hearing a decree be made establishing the contract right of your orator to be taxed in the method prescribed by the act of May 17, 1886, known as the "Hewitt bill," and not otherwise, and perpetually enjoining the defendants from assessing or certifying any assessment made of your orator's franchise or properties, and from collecting any of said taxes or penalties in behalf of either the city or State; and for all general and equitable relief to which your orator may be entitled.

HELM & BRUCE,
Solicitors for Complainant.

9 H. M. Burford says he is the president of complainant, and that the statements contained in the foregoing bill are true.

H. M. BURFORD.

Subscribed and sworn to before me by H. M. Burford this 17 day of April, 1897.

ARTHUR PETER,
Notary Public for Jefferson County, Kentucky.

My commission expires January 15, 1898.

A copy.
Attest: THOS. SPEED, *Clerk.*

10 The exhibit above referred to is as follows:

SINKING FUND OFFICE, *Feb'y* 13, 1894.

A committee, consisting of Messrs. Thomas L. Barrett, John H. Leathers, and George W. Swearingen, appeared before the board on behalf of the banks who are members of the Louisville clearing-house and stated that it was the purpose of said banks to resist

the payment of the license fee demanded of them under the license ordinance approved January 29, 1894, on the ground that said banks were not legally liable to pay the same, but, in order to save the sinking fund from any embarrassment occasioned by their refusal to pay said license fee, the banks, with two or three exceptions, were willing to enter into an arrangement whereby they would pay a part of the amount demanded of them and lend the sinking fund the balance thereof, to be repaid, with interest at four per centum per annum, if it was finally decided and adjudged that the banks were not liable to pay said license fees.

After discussion, the president was, on motion of Mr. Tyler, seconded by Mr. Summers, authorized to enter into the following arrangement with the different banks, trust, and title companies who will be subject to the payment of the license fees if the license ordinance is finally adjudged to be valid and enforceable:

First. To accept from each of said banks and companies a payment equal to the difference between the amount they now pay to the State for State taxes and the amount they would be required to pay for State taxes under the provisions of what is known as the "Hewitt bill." This sum shall be an actual payment, not to be repaid under any circumstances, but its payment shall not in any manner or to any extent *prejudice* the banks or companies paying it or be taken as a waiver of any legal right which they have in the premises.

Second. In addition to making the above payments the said banks and companies, save those selected to test the question involved, shall each lend to the sinking fund a sum which, added to said payment, will equal four per centum of its gross earnings during the year 1893, and the sinking fund will execute for said loans its obligations agreeing to repay the same, with interest at four *per* centum per annum, when and if it shall be finally adjudged by the court of last resort that said banks or companies are not liable to pay the license fee required by the ordinance aforesaid, but if it is finally adjudged that they are liable to pay said license fee, then the said loan shall be taken and deemed as a payment of said license fee and the obligation to repay the same shall be void.

Third. The banks or companies selected to test the question involved will each lend the sinking fund a sum equal to four per centum of their gross earnings for the year 1893 and will receive therefor the obligations of the sinking fund as above described.

Fourth. This arrangement is to be entered into with the understanding that the said banks and companies will institute without delay and diligently prosecute such actions as may be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund will not prosecute them or any of them for doing business without license.

A true copy.

Attest: J. M. TERRY,
Secretary & Treasurer.

12 Stipulation between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, and the banks, trust, and title companies of the city of Louisville.

It is agreed between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, represented by H. S. Barker, city attorney, acting under the advice and by the authority of the board of sinking fund commissioners, given at a regular meeting of said board, and the mayor of the city of Louisville, on the one part, and the various banks, trust and title companies of the city of Louisville, acting by Humphrey & Davie and Helm & Bruce, their attorneys, of the other part:

First. That in February, 1894, it was agreed between the city of Louisville and the board of sinking fund commissioners, acting together in the interest of the said city, and the various banks, trust and title companies, acting through their committee, to wit, Messrs. Thomas L. Barrett, John H. Leathers, and George W. Swearingen, and their counsel, to wit, Mess. Humphrey & Davie and Helm & Bruce, that the question of the liability of said banks and trust and title companies to pay municipal taxes, either license or ad valorem, otherwise than as provided by the revenue law, commonly known as the Hewitt bill, should be tested by appropriate litigation looking to that end.

Second. In order *the* effectually test the question as to all of said companies they were divided into three classes, it being understood that all who had accepted the provisions of the said Hewitt bill would fall in one or the other of the classes named, to wit:

13 A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It being understood that the trust and title companies which had accepted the provisions of the Hewitt bill would fall in class B, above named.

Third. In pursuance of that agreement the sinking fund commissioners caused to be issued warrants against the Bank of Kentucky, representing class A, the Louisville Banking Company representing class B, and the Third national bank, representing class C, and these banks respectively applied for writ of prohibition against the city court of Louisville proceeding with the hearing, that being the manner pointed out by the city charter for testing the validity of city ordinances.

It was distinctly understood and agreed at that time, and this agreement was made for the best interest of all parties to it, that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes; and it was also agreed that if any bank of any class should succeed in establishing a contract and the validity thereof under the Hewitt bill, that that should exempt all banks and companies

falling within that class from the payment of taxes, except as provided in the Hewitt bill.

Fourth. On the faith of this agreement all of the banks and companies aforesaid paid into the sinking fund the amounts of taxes claimed against them, under the terms and conditions
14 named in the minutes of the sinking fund commissioners of February 13th, 1894, an attested copy of which is hereto atteched as part hereof, but at a later date and in further reliance upon said agreement all said banks and companies, except those actually involved in the test cases, paid the whole of the amount of taxes claimed as against them by the city of Louisville without reservation until the question thus raised should be finally disposed of.

HUMPHREY & DAVIE,
HELM & BRUCE,
For the Banks, Trust, & Title Companies of the City of Louisville.
H. S. BARKER, *City Att'y.*

Approved:
C. H. GIBSON,
Pres't Com'rs Sinking Fund City of Lou.

A true copy.
Attest: HUSTON QUIN.
ARTHUR PETER.
M. McLOUGHLIN.

Upon which bill of complaint there issued the following subpœna in chancery:

The President of the United States of America to Samuel H. Stone, auditor public accounts Commonwealth of Kentucky; Charles Finley, secretary of state Commonwealth of Kentucky; George W. Long, treasurer of the Commonwealth of Kentucky; City of Louisville, Greeting:

You are hereby commanded to appear before our circuit court of the United States of America, for the district of Kentucky, at the Federal court hall, in the city of Louisville, on the first Monday in June next, to answer a bill in equity exhibited against you
15 in our said court, by Bank of Commerce, which you shall in nowise omit, under the penalty of the law.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States of America, and the seal of our said circuit court hereto affixed, at the clerk's office of said court, in Louisville, this 17 day of April, A. D. 1897, and in the 121 year of our Independence.

Attest:
[SEAL.] THOS. SPEED,
C. C. C., K. D.

MEMORANDUM.—The defendant- are to enter their appearance in the suit in the clerk's office, on or before the 7 day of June next, the

day at which the writ is returnable, otherwise the bill may be taken *pro confesso*.

THOS. SPEED, *Clerk*.

And the marshal returned the same with the following endorsement thereon:

Executed April 24th, 1897, on the City of Louisville by delivering a copy of the within spa. in ch'y to Geo. D. Todd, mayor of said city.

JAMES BLACKBURN,
United States Marshal,
By R. E. HAWES, *D. M.*

Executed May 4th, 1897, on Chas. Finley, sec't'y of state; May 14th on Geo. W. Long, treasurer; May 15th on Samuel H. Stone, auditor of public accounts, by delivering a copy of the within spa. in ch'y to each of them.

JAMES BLACKBURN,
United States Marshal.
R. D. TUCKER, *D. M.*

16 And on the 27th day of May, 1897, came the parties, by counsel, and filed stipulation herein.

Stipulation above referred to is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF COMMERCE, Complainant,
versus
SAMUEL H. STONE, &c., Defendants. } # 6567. Stipulation.

It is stipulated and agreed that the defendant City of Louisville may file a demurrer to the complainant's bill and an answer at the same time, without waiving the demurrer.

HELM & BRUCE,
Counsel for Complainant.
H. L. STONE,
Counsel for Defendant City of Louisville.

Demurrer above referred to is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF COMMERCE, Complainant,
versus
SAMUEL H. STONE, &c., Defendants. } # 6567. In Equity.

The Demurrer of The City of Louisville to the Bill of Complaint of Bank of Commerce, Complainant.

This defendant, by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint contained

to be true, in such manner and form as the same *is* therein set forth and alleged, demurs to said bill, and for cause of demurrer
17 states:

1. That the said bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against this defendant.

Wherefore and for divers other good causes of demurrer appearing in the said bill this defendant does demur thereto and humbly demands the judgment of this court whether it shall be compelled to make any further or other answer to the said bill, and prays to be hence dismissed with its costs and charges in this behalf most wrongfully sustained.

H. L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

I hereby certify, as counsel for the defendant City of Louisville in the foregoing demurrer, that in my opinion the same is well founded in point of law and proper to be filed.

H. L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

STATE OF KENTUCKY, *Jefferson County,* } *sct:*

Personally appeared before me, John F. Groene, a notary public in and for the county and State aforesaid, George D. Todd, who states that he is mayor and chief officer of the defendant City of Louisville, and the foregoing demurrer is not interposed for delay of the cause in which it is filed.

GEO. D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27 day of May, 1897. My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public, Jefferson County, Kentucky.

18 Answer above referred — is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF COMMERCE, Complainant,
versus
SAMUEL H. STONE, &c., Defendants. } No. 6567. In Equity.

The Answer of The City of Louisville, Defendant, to the Bill of Complaint of Bank of Commerce, Complainant.

This defendant, now and at all times hereafter, saving and reserving unto itself all benefit and advantage of exception which can or may be had, or taken to the many errors, uncertainties, and other

imperfections in the said bill contained, for answer thereunto, or to so much and such parts thereof as this defendant is advised it is material or necessary for it to make answer unto, answering—

This defendant denies that prior to the passage of the revenue law by the General Assembly of the Commonwealth of Kentucky, approved May 17, 1886, known as the "Hewitt bill," the law of said Commonwealth governing the taxation of banks, was unsatisfactory, or that there were then four banks, or any bank, chartered by said State prior to the year 1856, whose original charter life had not expired, or which held any charter or other contract or contracts beyond the power of the State to repeal, or that the Commonwealth was by any alleged contract or contracts bound, beyond its legislative control or power to alter, amend, and repeal, to receive fifty cents on each share of one hundred dollars of stock in said banks, or either of them, referred to as the "old banks," in full of its claim for taxation upon all the different kinds of property of said banks.

This defendant denies that there was any complication with the said old banks, or that in addition to such alleged complication with said old banks, the national banks in the State were claiming the right, or that they had the legal right, to be put upon a footing of equality as to taxation with said four old banks, or either of them, or that the courts of Kentucky had held that the national banks in said State could not be subjected to a heavier burden of taxation than said four old banks.

This defendant denies that no other bank in the State could be taxed at a materially higher rate than fifty cents on each share of one hundred dollars of its stock, without practically driving it out of business, or that it would thereby be unable to compete with said four old banks and the national banks, or that for this reason by the express provisions of the respective charters granted by the State, or by the general law, all banks and other institutions of loan or discount were taxed at the same rate as the old banks and national banks.

19 This defendant denies that the State was dissatisfied with the existing tax rate against banks and similar corporations, or desired to increase the rate, or desired, for the reason alleged, to have the tax rate on all the banks in the State uniform, or that this could only be done by exempting them from local taxation and increasing their tax to the State, or that it was not within the power of the State to increase the tax rate against the old banks except with their consent, or that they were asked, in the interest of uniformity, to consent, or that, in the interest of uniformity, or to secure to the banking interests in the State repose on the tax question for the remainder of their respective charter lives, the old banks did consent in the manner stated in the bill to the scheme of taxation therein described, or, as stated in the provisions of the act of May 17, 1886, referred to and quoted in the bill.

The defendant states, section six (6), article two (2), of said act of May 17, 1886, pertaining to the taxation of banks, expressly provided that said act (meaning article 2 therein, with respect to the taxation of banks), should be subject to the provisions of sec-

tion eight (8), chapter sixty-eight (68) of the General Statutes, which was as follows:

"All charters and grants of or to corporations, or amendments thereof, enacted or granted since the 14th of February, 1856, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: *Provided*, that whilst privileges and franchises so granted may be changed or repealed, no amendment or repeal shall impair other rights previously vested."

This defendant states that by said section six (6), article two (2), of the said act of May 17, 1886, the legislature of the State expressed its intention to reserve, and it did in fact reserve, its power to amend or repeal at the will of the legislature of the State, said act of May 17, 1886, or any part thereof, including the scheme for taxation of banks and the exemption of banks, from county and municipal taxes therein provided for, and a contrary intent was not therein plainly expressed.

This defendant further states that by section five (5) of article twelve (12) of said act of May 17, 1886, all other acts, general and special, and parts of acts inconsistent therewith, or not in conformity therewith, were repealed.

This defendant further states that the charter or grant of or to the complainant, or the amendment or amendments to its charter by the legislature of the State of Kentucky, and under which the complainant was organized or is engaged in carrying on its business, were enacted or granted since February 14, 1856, and all provisions therein with respect to the rate of taxation to be paid by complainant to the State, or exempting complainant from county and municipal taxation, were repealed by said section five (5), article twelve (12), of said act of May 17, 1886. This defendant denies that the complainant has regularly since February, 1894, paid its taxes to the city of Louisville.

This defendant denies that said act of May 17, 1886, and complainant's alleged acceptance thereunder, as provided by said statute, and complainant's payments thereunder and in accordance therewith, to the State of a sum in excess of that paid by individuals to the State on the same kind of property, and the acceptance thereof by the State, constituted a contract between the State on the one part and complainant and its stockholders on the other part, continuing during the legal existence of complainant's corporate life, or that the State was equally bound thereby, and no right to retire therefrom, or amend or repeal the same, provided for in section six (6), article two (2), of said act of May 17, 1886.

This defendant denies it was agreed between the State and the complainant that said alleged contract should subsist during the charter life of complainant, without the condition or qualification embodied in said section six (6), or that the State of Kentucky was unmindful of its alleged contract obligations with complainant, or others, when through its General Assembly it undertook, on November 11, 1892, to tax all the banks in the State in a manner different from that provided for in said alleged contract, and to sub-

ject them to all manner of local taxation, or that as applied to complainant the tax under the act of November 11, 1892, will exceed the tax which it would have to pay under the Hewitt bill by $20,000.

This defendant denies that the ordinance of 1894, providing for a license tax of four per cent. of the gross receipts or earnings of the banks and trust companies in the city of Louisville, in lieu of an *ad valorem* tax, was adopted under the authority of the statute entitled "An act for the government of cities of the first class," approved July 1, 1893, or in pursuance thereof, although it was
20 claimed that such authority existed when said ordinance was adopted; or that the defendant, on the demand of said license tax being refused, commenced legal proceedings in the city court of Louisville in behalf of the city against all of said banks and trust companies, including the complainant.

This defendant denies that it was agreed between the city of Louisville and the commissioners of the sinking fund of the city of Louisville upon the one part, and the said banks and trust companies, including the complainant, upon the other, that, pending the litigation concerning the validity of said ordinance providing for a license tax upon said banks and trust companies, payments and loans to said commissioners of the sinking fund should be made, in the manner or upon the terms and conditions, as stated in complainant's bill, or that this defendant agreed that said litigation should be inaugurated, or that such alleged payments or loans to said commissioners of the sinking fund should be without prejudice to the alleged rights of said banks and trust companies, or either of them.

This defendant denies that it agreed, as alleged in complainant's bill, to the selection of any bank or company to test the questions involved in said litigation, or that this defendant made, entered into, or was a party to said alleged contract or agreement, written or verbal, with respect to said litigation over the validity of said license tax, or the ordinance providing for the collection thereof from the banks and trust companies in the city of Louisville, or that said banks and trust companies should be divided into three classes, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

This defendant denies that it was understood that the trust or title companies, which are alleged to have accepted the provisions of the Hewitt bill would fall in said class "B," or that this defendant agreed that if any bank in any class should eventually fail to establish the existence or validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes, or that this defendant agreed that if any bank of any class should succeed in establishing the alleged contract, or the validity thereof under the Hewitt bill, that that should exempt all banks and trust companies, or any bank or trust company falling

within that or any of said alleged classes from the payment of taxes, except as provided in the Hewitt bill.

This defendant denies that said alleged agreement, an alleged copy of which, or the substance of which is filed with complainant's bill, marked "A," was signed by the attorney for the city of Louisville under the authority or direction of the mayor, or that this defendant executed or delivered said alleged contract or agreement, or that the same was ever authorized, ratified, or approved by the general council and mayor of the city of Louisville, and said alleged agreement or contract set forth in said copy marked "A" is not the act and deed of this defendant, and in so far as the same purports to be an agreement or contract by or with this defendant it was beyond the lawful power or authority of the city attorney, mayor, or any other officer of this defendant to execute or deliver for or on behalf of this defendant, and the same was made without express authority of law, and was and is null and void, and of no binding force or effect upon this defendant, nor does the same operate to prevent or defeat the power and authority vested in this defendant by said act entitled "An act for the government of cities of the first class," approved July 1, 1893, to levy and collect its municipal taxes from the complainant and other banks and trust companies.

This defendant states that said commissioners of the sinking fund of the city of Louisville was, in 1894, and long prior thereto, and ever since has been, a separate and distinct corporation from this defendant, organized and existing under the laws of the State of Kentucky, with power to sue and be sued, contract and be contracted with, and to do and perform all things necessary to execute the duties required and powers given by the act incorporating the same and the amendments thereto; but, neither said commissioners of the sinking fund of the city of Louisville, nor the president nor the attorney thereof, nor all of them together, had any lawful power or authority thus to bind or obligate defendant by the terms, conditions, stipulations, or covenants, or either of them, contained in said alleged agreement or contract, at the time, in the manner, or under the circumstances alleged in complainant's bill, or otherwise.

21 This defendant denies that said alleged agreement or contract was duly executed, or on the faith, or in reliance thereon, the various banks and trust companies of the city of Louisville, including the complainant, or either of them, paid into the said sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the alleged minutes of said commissioners of the sinking fund; or that, at a still later date, the said banks and trust companies, except those already involved in the alleged test cases, paid the whole amount of the taxes claimed against them by this defendant, without reservation, until the question should be finally disposed of, or that this was done without prejudice to the alleged rights of said banks and trust companies, or was not to be deemed a waiver by them of any of their claimed rights, or that the same was done to prevent confusion from coming into the management of said sinking fund, or that the taxes

against banks claimed by the city had been transferred to the sinking fund of said city, except as provided for in said license-tax ordinance, which was invalid and unconstitutional, because the license tax aforesaid was, and was intended to be, by said ordinance in lieu of the *ad valorem* tax levied upon all other assessed, individual and corporate, tangible and intangible, property in the city of Louisville, and thus violated the constitution of the State of Kentucky.

This defendant denies that it made any agreement that the said alleged payments to said sinking fund should not last longer than the alleged final decision in favor of the banks, if such decision should be rendered, or that the amount paid by the banks and trust companies to this defendant, or said commissioners of the sinking fund, under said alleged agreement, was or is over $150,000.

This defendant denies that with a view of testing every phase of the question, or so that a decision when rendered would determine the liability of every bank and trust company in the city of Louisville, three suits were brought pursuant to said alleged contract, or that there was any contract with this defendant to do so, or that the Bank of Kentucky in the suit it brought represented the Bank of Louisville, or that the Louisville Banking Company in the suit it brought represented all or either of the other banks and trust companies in the city whose charters were granted by the State since 1856, or that the Third national bank, in the suit brought by it, represented all or either of the other national banks of the city.

This defendant denies that it was a party to the said suits brought by the Bank of Kentucky, Louisville Banking Company, and the Third national bank, or either of them, or that this defendant prosecuted an appeal from the judgment of the Jefferson circuit court against the Bank of Kentucky, or that either the Louisville Banking Company or the Third national bank prosecuted an appeal from the judgment of said court against this defendant, or that either of said three suits was really against the city of Louisville; or that in the court of appeals this defendant was represented by its corporation counsel, or that said counsel represented any party in either of said cases in said court or the Jefferson circuit court, except R. H. Thompson, judge of the police court of the city of Louisville, and, indirectly, said commissioners of the sinking fund, for whom he was then the regularly employed attorney, and to whom the license tax against said banks and trust companies, under the ordinance aforesaid, was made payable.

This defendant denies that it was a party to the record in the court of appeals on either of said three appeals, or as such was represented in that court by its official attorney.

This defendant states that the records in said three cases will show what questions were submitted to the circuit court and court of appeals, and what were the issues made by the pleadings and decided by each of said courts, as well as what the contentions of each party were before said courts, and this defendant denies all statements in complainant's bill inconsistent with the records aforesaid. It is true, however, that the court of appeals, on June 1, 1895, decided on said three appeals that the license tax for the fiscal year ending

August 31, 1894, fixed by the ordinance aforesaid, was invalid and not enforceable against the Bank of Kentucky, Louisville Banking Company, and the Third national bank, which had complied with the provisions of the act of March 17, 1886, and that the provisions of the constitution of the State of Kentucky, adopted September 28, 1891, and of the general revenue law, approved November 11, 1892, did not repeal the provisions of article two (2) of the Hewitt bill, with respect to said three banks, and that said three banks had an irrepealable contract with the State to pay their taxes, as provided in the Hewitt bill; and in pursuance of said decision the said judge of the police court of the city of Louisville was prohibited from taking any further steps or proceedings upon the warrants issued against said three banks and pending in said police court for carrying on a banking business during the fiscal year ending August 31, 1894, without paying the license tax, as provided in the ordinance aforesaid.

22 This defendant denies that said former adjudication constitutes a bar to any further claim by or on behalf of the city of Louisville for *ad valorem* taxes, or other taxes not involved in said actions against said three banks which instituted said actions, or a bar to any claim for *ad valorem* taxes by or on behalf of this defendant against complainant, or either of the other banks and trust companies in the city of Louisville, provided, or in the event, the court of appeals of the State of Kentucky at any time should overrule its said decision rendered on June 1, 1895, in the actions aforesaid, and decide that the banks and trust companies in said State have no such irrepealable contract, and are bound to pay taxes on their property, tangible and intangible, to the State and to the counties and municipalities in which their places of business are located, at the same rate fixed therein as against individuals and all other corporations, in accordance with the provisions of the State constitution of September 28, 1891, and said general revenue law of November 11, 1892, set forth in complainant's bill.

This defendant denies that the scheme of taxation contained in said act of November 11, 1892, impairs the obligation of complainant's alleged contract, or is, for that reason, in violation of the provision of the Federal Constitution, prohibiting a State from impairing the obligation of a contract, or that said scheme of taxation is in violation of section 181 of the State constitution, which declares that the "General Assembly shall not impose taxes for the purposes of any county, city, town, or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect such taxes," and this defendant denies that the General Assembly, by the provisions of the revenue law of November 11, 1892, has imposed taxes for the purposes of any county, city, town, or other municipal corporation, and the court of appeals of the State of Kentucky has construed said section of the State constitution as meaning that the General Assembly shall not impose or fix the *amount* or *rate* of taxes for the purposes of any county, city, town, or other municipal corporation; and has further decided, as has the Supreme Court of the United States,

that the provisions of said revenue law of November 11, 1892, with respect to the assessment of the franchises or intangible property, of corporations, companies, and associations by the State board of valuation and assessment, in the method set forth in the complainant's bill, are not violative of, but in harmony with, the constitution of the State of Kentucky.

This defendant denies that the city of Louisville claimed, or threatened at or before the institution of this action, or does now claim or threaten, or so long as said decision of the court of appeals of Kentucky, rendered June 1, 1895, referred to in the complainant's bill, remains in full force and effect, will claim the right to collect, or threaten to collect, from the complainant any tax held to be unlawful by said decision, or under the revenue law of November 11, 1892, on either an assessment by the city assessor of this defendant, or by the State board of valuation and assessment.

This defendant denies that the State board of valuation and assessment will, unless restrained by this honorable court, proceed to assess the complainant in the manner pointed out by the act of November 11, 1892, when it has no lawful right to do so, or that it will thereby cast a cloud upon the complainant's alleged right to pay taxes under and in accordance with its alleged contract, or that the auditor will, unless restrained, certify said assessment to the county court clerk of Jefferson county, or that said clerk will, in turn, certify the same to the tax collector of the city of Louisville, or that this defendant will attempt to collect from the complainant a tax in its favor upon said assessment, or that the complainant will thus be subjected to harassment or litigation, or that if said assessment be not restrained or is allowed to be made the State of Kentucky will claim that unless the complainant pays taxes according to said alleged illegal scheme devised by said State that the complainant would be subject to the penalties and interest on State taxes, as provided in the revenue law of November 11, 1892.

This defendant denies that, unless restrained, the complainant will be improperly annoyed or harassed with litigation, or the value of its stock greatly, or at all, impaired, or the stockholders injured by suits instituted by this defendant or the State in their attempt respectively to enforce, as against the complainant, the taxes attempted to be imposed or the penalties denounced by the statute aforesaid.

This defendant denies that it was, at or before the institution of this action, or is now insisting that the auditor of the State, the defendant, Samuel H. Stone, shall certify to the county court clerk of Jefferson county the assessment alleged to have been, or to be illegally, made by said State board, so that its tax collector may endeavor to enforce, as against the complainant and the other banks and trust companies in the city, the taxes for city purposes; and this defendant denies that the said auditor has threatened to
23 so certify said assessment, or will, unless restrained, certify said assessment for the years 1895, 1896, and 1897, or either of them, to the said clerk, or that said clerk will certify the same to

the tax collector of the city of Louisville, or that any further assessment by said State board, or for the years 1895, 1896, and 1897, or either of them, has been, or is, threatened or will be made, or that any such certification thereof has been, or is, threatened, or will be made by said auditor, so long as said decision of the court of appeals of Kentucky of June 1, 1895, is not overruled and remains in full force and effect.

This defendant, for further answer and defense to complainant's bill, states that the court of appeals of Kentucky, on March 24, 1897, in the case of Deposit Bank of Owensboro *v.* Daviess County, and other bank tax cases, wherein the same legal questions were involved and issues were made, as in the three cases referred to in the complainant's bill, rendered a decision in which the former decisions of said court, in said three cases delivered June 1, 1895; and in the cases of Franklin County Court *v.* Deposit Bank of Frankfort, Same *v.* Bank of Kentucky, and other bank tax cases, decided June 5, 1888, reported in 87 Ky. Rep., 370, were expressly overruled; and said court furthermore decided that no bank, State or national, trust company, or other similar institution in the State of Kentucky, had or was entitled to an irrepealable contract with the State under the provisions of the Hewitt bill, or by reason of its acceptance of, or compliance with, those provisions, and that the same, with respect to all said banks and similar institutions in the State, were repealed by the State constitution of September 28, 1891, and the general revenue law of November 11, 1892, and were bound and liable to pay State, county, and municipal taxes, and at the same rate as individuals and other corporations; that the legislature of Kentucky reserved in section six (6), article two (2) of said act of May 17, 1886, the power at will to amend or repeal the scheme of bank taxation provided for in said article of said act, which express reservation of power to amend or repeal formed a part of the contract, if any, between the State and the banks, and other similar institutions, which had accepted the provisions of said act and complied therewith; that the repeal of the Hewitt bill, with respect to the method and rate of bank taxation by the State constitution and general revenue law of November 11, 1892, did not impair the obligation of any contract with such banks, but that said repeal was only a legitimate exercise of the said reserved power in the legislature to amend or repeal; and that the acts of the legislature, adopted subsequent to February 14, 1856, amending the original charters of said four old banks, were grants to said corporations and extensions of the period of their charter existence, within the purview of the statute of February 14, 1856, referred to in the complainant's bill, and were all subject to amendment or repeal by the legislature.

This defendant states that by the concluding section of said revenue law of November 11, 1892, all acts or parts of acts in conflict therewith, including the Hewitt bill, with respect to taxation, were repealed.

This defendant states that said decision of March 24, 1897, by the rules of said court of appeals, does not become final until the ex-

piration of thirty days, excluding Sundays, after the date of its rendition, nor until the expiration of such further time as may be given within said period by said court in which to file a petition for a rehearing, nor until such petition for a rehearing is overruled; and this defendant states that, within said period of thirty days, said court gave further time to counsel representing the banks, which were parties in said cases so decided, to wit: sixty days, excluding Sundays, from March 24, 1897, in which to file petitions for a rehearing, some of which have been filed, and said period of extension has not yet expired, nor has said decision become final.

This defendant, while disavowing any intention or purpose, on its part, to collect or attempt to collect municipal taxes from the complainant, or any other bank or trust company in the city of Louisville, held to be unlawful by said decision of the court of appeals of Kentucky, of June 1, 1895, so long as said decision is not overruled and remains in full force and effect, it avers that should said decision of said court of March 24, 1897, become final and in full force and effect, it will, in that event, as in duty bound, proceed to collect from the complainant and all other banks and trust companies, municipal taxes in accordance therewith, and as authorized by the laws of the State of Kentucky, but not otherwise.

This defendant states that the complainant has not filed its annual report for the years 1895, 1896 and 1897 with the auditor or the State board of valuation and assessment, as required by the revenue law of November 11, 1892.

24 This defendant, therefore, submits that the complainant was not, at the institution of this action, and is not now, being subjected to any false claim or claims, nor to any suit or suits, nor will it suffer irreparable or any injury, unless an injunction *pendente lite* be granted herein commanding this defendant, its officers and agents, to refrain from endeavoring by distraint, suit, or otherwise, from collecting or attempting to collect any of the taxes on assessments heretofore certified to it, based on the alleged illegal assessment of the franchise of the complainant until the further order and determination of this court.

This defendant denies that the complainant is entitled to any injunction whatever, or to any other equitable relief in this court.

Wherefore, having answered, this defendant prays that the complainant's bill be dismissed, with judgment for its costs, and for all other relief to which it in equity may appear to be entitled.

H. L. STONE,
City Attorney, Solicitor for the Defendant City of Louisville.

STATE OF KENTUCKY, }
Jefferson County, } *sct:*

Personally appeared before me, John F. Greene, a notary public in and for the county and State aforesaid, the affiant, George D. Todd, who states he is the mayor and chief officer of the defendant City of Louisville, and the facts stated in the foregoing answer so

far as stated from his personal knowledge are true, and so far as stated from information, he believes the same to be true.

GEO. D. TODD.

Subscribed and sworn to before me by said George D. Todd, mayor, this 27 day of May, 1897.

My commission expires January 23, 1900.

JNO. F. GROENE,
Notary Public of Jefferson County, Kentucky.

25 And on the 28th day of May, 1897, the following order was entered:

This day came complainant in the above-entitled cause and filed herein notice of motion to be entered herein this day; and thereupon came the complainants, The Bank of Kentucky and The Bank of Louisville, by Humphrey & Davie, counsel, and the complainants in all the other causes, by Helm & Bruce, counsel, and moved the court to enter an order herein enjoining and restraining the defendants, Samuel H. Stone, Geo. W. Long, and Chas. Finley, comprising the board of valuation and assessment, from valuing or certifying the value of the intangible property and franchises of the complainants under the act of November 11th, 1892, until the further order of this court herein, and enjoining and restraining the other defendants herein, to wit, The City of Louisville, The County of Franklin, and The Board of Councilmen of the City of Frankfort, from endeavoring to collect any taxes under such certification until the further order of the court.

And at the same time, the City of Louisville appearing herein by H. L. Stone, city attorney, and the County of Franklin appearing herein by Ira Julian and J. H. Polsgrove, and the Board of Councilmen of Frankfort appearing herein by Ira Julian, objected to the said motion and the same was argued and submitted, and the court not being advised takes time.

And at the same time came the Board of Councilmen of the City of Frankfort and the County of Franklin, by the said Ira Julian and J. H. Polsgrove, and filed herein a demurrer to the bill of complaint of the Bank of Kentucky to the jurisdiction of the court, and also a general demurrer, and by consent and without waiving the
26 effect of the said demurrer, filed answers of the said Board of Councilmen of the City of Frankfort and the County of Franklin to the said bill of complaint.

And also came the said Samuel H. Stone, Geo. W. Long, and Chas. Finley, by W. S. Taylor, attorney general, and filed herein their several demurrers to the said bill of complaint; and the said cause having been *agreed* by counsel upon the said general and special demurrers as well as upon the demurrers of the City of Louisville, was submitted, and the court not being advised takes time.

Demurrer above referred to is as follows:

In the Circuit Court of the United States for the Sixth District of Kentucky.

BANK OF COMMERCE, Complainant,
vs.
SAMUEL H. STONE, ETC., Defendants. } # 6567.

The demurrer of the defendants Samu*le* H. Stone, auditor; Charles Finley, secretary of state, and George W. Long, treasurer, of the State of Kentucky, to the bill of complaint of Bank of Commerce, complainant.

27 These defendants, by protestation, not confessing any or all of the matters and things in the complainant's bill of complaint contained, to be true in such manner and form as the same *is* therein set forth and alleged, demur to said bill and for cause of demurrer state:

1. That the said bill fails to state facts sufficient to show jurisdiction in this court.

2. That the said bill does not contain any matter of equity whereon this court can ground any decree or give to the complainant any relief against these defendants.

Wherefore and for divers other good *cuases* of demurrer appearing in the said bill these defendants demur thereto and humbly demand the judgment of this court whether they shall be compelled to make any further or other answer to the bill, and pray to be hence dismissed with their costs and charges in their behalf most wrongfully sustained.

W. S. TAYLOR,
Attorney General of the State of Kentucky.

I hereby certify as counsel for the defendants Samuel H. Stone' auditor; Charles Finley, secretary of state, and George W. Long' treasurer of the State of Kentucky, in the foregoing demurrer, that' in my opinion, the same is well founded in point of law and proper to be filed.

W. S. TAYLOR,
Attorney General of the State of Kentucky.

And on May 9th, 1898, the following order was entered:

28 Came this day the complainants in the above-styled cases, wherein Samuel H. Stone is one of the defendants, and filed herein an amended and supplemental bill of complaint, and the complainant in the said case also filed herein notice duly served of the motion to be made this day; and came Samuel H. Stone, Charles Finley, and G. W. Long, by Richard Ernst, their attorney, and entered appearance to such motions, and also came the City of Louisville and objected to the filing of said supplemental bill of complaint and sa-d motions and filed herein affidavits to be read in each case, and also came the City of Frankfort and Franklin County and objected to the motions made in cases, to which these defendants are parties, and, the court being advised, it is now ordered, adjudged, and decreed that the said several defendants in

the above-styled cases are enjoined and restrained as follows: The defendants Stone, Finley, and Long are enjoined and restrained from making or certifying any assessment against the complainants or any of them for the years 1895, 1896, 1897, and 1898 or any of them, and the defendant The City of Louisville is enjoined and restrained from bringing or maintaining any action against any of the complainants on account of assessments heretofore made and certified for the years 1893 and 1894, or from attempting, by distraining or otherwise, from collecting taxes on said assessments for either of said years.

This order is only to stand until Saturday, June 4th, 1898, when the court will announce its decision on pending questions.

Said amended and supplemental bill above referred to is as follows:

29 United States Circuit Court, District of Kentucky.

BANK OF COMMERCE, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants.
} Amended and Supplemental Bill.

The Bank of Commerce, complainant herein, and by way of amended and supplemental bill in this cause, says that since the filing of the original bill herein and the hearing before this court of the motion for an injunction the defendants Samuel H. Stone, Charles Finley, and G. W. Long, being respectively the auditor of public accounts, the secretary of state, and the treasurer of the State of Kentucky, and as such constituting the board of valuation and assessment of the State of Kentucky, have threatened and are now threatening to assess and will as such board, unless restrained by this honorable court, proceed to assess your orator for taxation in the manner pointed out by the act of November 11th, 1892, referred to in the original bill herein, for the year 1898, when they have no lawful right to do so for the reasons shown in the original bill herein, and will thereby cast a further cloud upon your orator's right to pay taxes under and in accordance with its contract, which is fully set forth and explained in the original bill herein; and the said Samuel H. Stone, as auditor aforesaid, will, unless restrained, certify said assessment to the county clerk of Jefferson county, Kentucky, who will in turn certify the same to the tax collector of the city of Louisville, and said city will attempt, by distraint and otherwise, to collect from your orator a tax in favor of said city upon said assessment for the year 1898.

30 Wherefore your orator prays as in its original bill herein, and that a writ of subpœna issue on this supplemental bill against the defendants to appear and answer same (but not under oath, which is waived), and that they and each of them be enjoined from making or certifying any assessment for taxation against your orator or attempting to collect any tax from your orator for the year 1898 or any other year until the final order and determination of this

court, and for all general and equitable relief to which your orator may be entitled.

HELM & BRUCE,
For Complainant.

H. M. Burford says he is the president of complainant, and that the statements in the foregoing supplemental bill are true.

H. M. BURFORD.

Subscribed and sworn to before me by H. M. Burford this May 6th, 1898.

HUSTON QUIN,
N. P. J. C., Ky.

Commission expires with next Kentucky legislature.

And on June 4th, 1898, the following order was entered:

31 It is ordered by the court that the preliminary injunction heretofore granted be, and the same is hereby, continued until the 25th day of June, 1898.

And on the 25th day of June, 1898, the following order was entered:

This cause coming on to be heard, the court delivered a written opinion herein, which is ordered to be filed, and it is now adjudged, ordered, and decreed as follows:

First. The demurrer of the City of Louisville to the bill of complaint be, and it is hereby, overruled; to which the City of Louisville excepts.

Second. That the demurrer of Samuel H. Stone, Charles Finley, and George W. Long to the bill of complaint be, and it is, overruled; to which the said Stone, Finley, and Long severally except.

Third. That until the further order of this court the defendants Samuel H. Stone, Charles Finley, and George W. Long are enjoined and restrained from making or certifying any assessment of the rights, properties, or franchises of the complainant under the act of the legislature of Kentucky approved November 11, 1892, and from certifying any such valuation to the city of Louisville or to the county clerk of Jefferson county.

And then came complainant and filed herein its general replication.

Said replication is as follows:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

BANK OF COMMERCE, Complainant,
vs.
S. H. STONE, &c., Defendants.

32 *Replication.*

This repliant, saving and reserving to itself all and all manner of advantage of exception which may be had and taken to the mani-

fold errors, uncertainties, and insufficiencies of the answer of the said defendants, for replication thereunto, saith that it doth and will aver, maintain, and prove its said bill to be true, certain, and sufficient in the law to be answered unto by the said defendants, and that the answer of the said defendants is very uncertain, evasive, and insufficient in law to be replied unto by this repliant; without that, that any other matter or thing in the said answer contained material or effectual in the law to be replied unto, and not herein and hereby well and sufficiently replied unto, confessed or avoided, traversed or denied, is true; all which matters and things this repliant is ready to aver, maintain, and prove as this honorable court shall direct, and humbly prays as in and by its said bill it hath already prayed.

HELM & BRUCE,
Solicitors for Complainant.

Opinion above referred to is as follows:

33 Circuit Court of the United States, District of Kentucky.

BANK OF COMMERCE, Complainant,
vs.
CITY OF LOUISVILLE, Defendant. } No. 6568.

BANK OF COMMERCE, Complainant,
vs.
SAMUEL H. STONE and Others and THE CITY OF LOUISville, Defendants. } No. 6567.

Before Harlan, circuit judge, and Taft and Lurton, circuit judges.

Heard on demurrer to the bill and motion for preliminary injunction.

The Bank of Commerce is a State bank of Kentucky, organized under a statute of that State, approved February 10, 1865. It is situated in Louisville, and when the Hewitt act was passed to amend the revenue laws of the Commonwealth of Kentucky, May 17, 1886, it duly accepted the terms of that act before the meeting of the next legislature of Kentucky. One of the grounds relied upon in the bill was that of *res judicata*. The averments of the bill upon this point were contained in paragraphs 4 and 5 of the bill, as follows:

"Paragraph 4. Your orator shows that early in the year 1894, and before the 4th of May, 1894, the defendant, The City of Louisville, claiming to act under the authority of the statute governing cities of the first class, and of its ordinances adopted in pursuance thereof, demanded of your orator, and of every other bank and trust company in the city of Louisville, a tax equal to 4 per cent. of its gross receipts, and this demand being refused, legal proceedings were commenced in the city court of Louisville, in behalf of the city, against all of said banks and trust companies, including your orator. At that date the tax upon the gross receipts of the banks, if enforceable, was payable to the sinking fund of the city of Louisville, and

with a view of embarrassing the sinking fund of the city as little as possible, the banks, through their committee, held a meeting with the commissioners of the sinking fund, and it was agreed between the city of Louisville and its sinking fund commissioners upon
34 the one part and the banks and trust companies of the city of Louisville, including your orator, upon the other, that pending the litigation which, by the agreement, was to be inaugurated, and without prejudice to the right of the banks, they would make payments and loans to said sinking fund as follows:

"First. The sinking fund was to accept from each of said banks and trust companies a payment equal to the difference between the amount which the banks and trust companies would have to pay to the State under the present law and the amount which they would be required to pay for State taxes under the provisions of the Hewitt bill. This sum, it was provided, should be an actual payment, and not be repaid under any circumstances, but its payment was not in any manner or to any extent to prejudice the banks or trust companies paying it, or to be taken as a waiver of any legal right which they might have in the premises.

"Second. In addition to making the above payments, the banks and trust companies, save those which were to be selected to test the question involved, should each lend to the sinking fund a sum, which, added to said payment, would equal 4 per centum of its gross earnings during the year 1893, and the sinking fund would execute for said loans its obligations, agreeing to repay the same with interest at 4 per centum per annum; and, if it should be finally adjudged by the court of last resort that said banks or trust companies were not liable to pay the license fee required by the ordinance aforesaid, but if it should be finally adjudged that they were liable to pay said license fee, then said loan should be taken and deemed as a payment of said license fee, and the obligation to repay same should be void.

"Third. It was agreed that the banks or companies selected to test the questions involved would each lend the sinking fund a sum equal to 4 per centum of the gross earnings for the year 1893, and would receive therefor the obligations of the sinking fund as above described.

"Fourth. It was further agreed that that arrangement was entered into with the understanding that the banks and companies would institute without delay and diligently prosecute such action as might be necessary to settle and adjudge the rights and liabilities of the parties in the premises, and pending such proceedings the sinking fund would not prosecute them, or any of them, for doing business without license.

"The substance of this agreement was spread at large upon the records of the sinking fund, and a copy thereof is filed herewith as part hereof, marked 'A.'"

The Exhibit "A" referred to is as follows:

"SINKING FUND OFFICE, *February* 13, 1894.

A committee, consisting of Messrs. Thomas L. Barrett, John H. Leathers and George W. Swearingen, appeared before the board on behalf of the banks, who are members of the Louisville clearing-house, and stated that it was the purpose of said banks to resist the payment of the license fee demanded of them under the license ordinance approved January 29, 1894, on the ground that said banks were not legally liable to pay the same, but in order to save the sinking fund from any embarrassment occasioned by their refusal to pay said license fee, the banks, with two or three exceptions, were willing to enter into an arrangement, whereby they would pay a part of the amount demanded of them, and lend the sinking fund the balance thereof, to be repaid with interest at four per centum per annum, if it was finally decided and adjudged that the banks were not liable to pay said license fees.

After discussion, the president was, on motion of Mr. Tyler, seconded by Mr. Summers, authorized to enter into the following arrangement with thedifferent banks, trust and title companies, who will be subject to the payment of the license fees, if the license ordinance is finally adjudged to be valid and enforceable:

First. To accept from each of said banks and companies a payment equal to the difference between the amount they now pay to the State for State taxes and the amount they would be required to pay for State taxes under the provisions of what is known as the Hewitt bill. This sum shall be an actual payment, not to be repaid under any circumstances, but its payment shall not in any manner, or to any extent, prejudice the banks or companies paying it or be taken as a waiver of any legal right which they have in the premises.

Second. In addition to making the above payments, the said banks and companies, save those selected to test the question involved, shall each lend the sinking fund a sum which added to said payment will equal four per centum of its gross earnings during the year 1893, and the sinking fund will execute for said loans its obligations agreeing to repay the same with interest at four per centum per annum, when, and if, it shall be finally adjudged by the court of last resort that said banks or companies are not liable to pay the license fee required by the ordinance aforesaid, but if it is finally adjudged that they are liable to pay said license fee, then the said loan shall be taken and deemed as a payment of said license fee, and the obligation to repay the same shall be void.

Third. The banks or companies selected to test the questions involved will each lend the sinking fund a sum equal to four per centum of their gross earnings for the year 1893, and will receive therefor the obligations of the sinking fund as above described.

Fourth. This agreement is to be entered into with the understanding that the said banks and companies will institute without delay and diligently prosecute such actions as may be necessary to settle and adjudge the right and liabilities of the parties in the

premises, and pending such proceedings the sinking fund will not prosecute them or any of them for doing business without license.

A true copy.

Attest:

J. M. TERRY,
Secretary and Treasurer.

36 Stipulation between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, and the banks, trust, and title companies of the city of Louisville.

It is agreed between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, represented by H. S. Barker, city attorney, acting under the advice and by the authority of the board of sinking fund commissioners given at a regular meeting of said board and the mayor of the city of Louisville on one part, and the various banks, trust and title companies of the city of Louisville, acting by Humphreys & Davie and Helm & Bruce, their attorneys, of the other part:

First. That in February, 1894, it was agreed between the city of Louisville and the board of sinking fund commissioners, acting together in the interest of the said city, and the various banks, trust and title companies, acting through their committee, to wit: Messrs. Thomas L. Barrett, John H. Leathers and George W. Swearingen, and their counsel, to wit: Messrs. Humphrey & Davie and Helm & Bruce, that the question of the liability of said banks and trust and title companies to pay municipal taxes, either license or ad valorem, otherwise than as provided by the revenue law, commonly known as the Hewitt bill, should be tested by appropriate litigation looking to that end.

Second. In order to effectually test the question as to all of said companies they were divided into three classes, it being understood that all who had accepted the provisions of the said Hewitt bill would fall in one or the other of the classes named, to wit:

A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It being understood that the trust and title companies which had accepted the provisions of the Hewitt bill, would fall in class B, named above.

Third. In pursuance of that agreement the sinking fund commissioners, caused to be issued warrants against the Bank of Kentucky, representing class A; the Louisville Banking Company, representing class B, and the Third national bank, representing class C, and these banks respectfully applied for writ of prohibition against the city court of Louisville proceeding with the hearing, that being the manner pointed out by the city charter for testing the validity of city ordinances.

It was distinctly understood and agreed at that time, and this agreement was made for the best interest of all parties to it, that if any bank in any class should eventually fail to establish the exist-

ence and validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes. And it was also agreed that if any bank of any class should succeed in establishing a contract and the validity thereof under
37 the Hewitt bill, that that should exempt all banks and companies falling with that class from the payment of taxes, except as provided in the Hewitt bill.

Fourth. On the faith of this agreement all of the banks and companies aforesaid paid into the sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the minutes of the sinking fund commissioners, of February 13, 1894, an attested copy of which is hereto attached as part hereof, but at a later date and in further reliance upon said agreement all said banks and companies, except those actually involved in the test cases, paid the whole of the amount of taxes claimed as against them by the city of Louisville without reservation until the question thus raised should be finally disposed of.

HUMPHREY & DAVIE,
HELM & BRUCE,
For the Banks, Trust, and Title Companies of the City of Louisville.
H. S. BARKER, *City Attorney.*

Approved:
C. H. GIBSON,
Pres't Com'rs Sinking Fund, City of Louisville.

A true copy.
Attest:

HUSTON QUIN.
ARTHUR PETER.
M. McLOUGHLIN."

So much of the certified transcript of the judgment in the proceedings in prohibition as is of importance has been set forth in the report of the case of Louisville Banking Company against the same defendants.

TAFT, circuit judge, delivered the opinion of the court:

In the case of the *Bank of Kentucky v. Stone*, just decided, we have held that by the judgment of the court of appeals and of the Jefferson circuit court in the prohibition suits, the city of Louisville was estopped to deny as against the parties to that judgment, that they had an irrevocable contract of exemption from any greater burden of taxation than that imposed in the Hewitt act. The complainant in the case now before us was not a party to the record in either of the three prohibition suits, but it claims the benefit of the judgment therein as a privy to the parties. This privity is said to arise from an agreement between the city of Louisville on the one part and certain banks of Louisville, including the complainant, on the other by which it was stipulated that the controversies between

all the banks and the city should abide the event in test suits to be instituted by three banks selected to represent three classes.

Two questions are presented for our consideration:

First. Was the contract described in the bill and attached
38 to it as an exhibit, the contract of the city of Louisville?

Second. If so, did the contract bring the complainant into such relation to the prohibition judgment and the parties thereto that it may claim the benefit of the estoppel of that judgment?

First. The averment of the bill is that the contract set forth was signed by the president of the sinking fund and by the attorney for the city under the authority and direction of the mayor and board of sinking fund commissioners and by the counsel who represented the banks in said litigations. The bill further recites that the agreement was made between the city of Louisville and its sinking fund commissioners and the banks and trust companies including the complainant. Upon demurrer to the bill, these averments would doubtless be sufficient to show that the contract which was made was the contract of the city of Louisville. But the case is pending also upon the motion for a preliminary injunction; and upon that motion it is proper for us to consider the answer of the city of Louisville, which by stipulation, was permitted to be filed without the withdrawal of the demurrer. The answer contains this averment:

"This defendant denies that said alleged agreement, an alleged copy of which, or the substance of which is filed with complainant's bill, marked 'A,' was signed by the attorney for the city of Louisville, under the authority of the mayor, or that this defendant executed or delivered said alleged contract or agreement or that the same was ever authorized, ratified or approved by the general council and mayor of the city of Louisville and said alleged agreement or contract set forth in said copy marked 'A' is not the act and deed of this defendant, and in so far as the same purports to be an agreement or contract by or with this defendant, it was beyond the lawful power or authority of the city attorney, mayor, or any other officer of this defendant to execute or deliver for or on behalf of this defendant, and the same was made without express authority of law, and was and is null and void, and of no binding force or effect upon this defendant, nor does the same operate to prevent or defeat the power and authority vested in this defendant by said act entitled 'An act for the government of cities of the first class' approved July 1, 1893, to levy and collect its municipal taxes from the complainant and other banks and trust companies.

This defendant states that said commissioners of the sinking fund of the city of Louisville was, in 1894, and long prior thereto, and ever since has been a separate and distinct corporation from this defendant, organized and existing under the laws of the State of Kentucky, with power to sue and be sued, contract and be contracted with, and to do and perform all things necessary to execute
39 the duties required and powers given by the act incorporating the same and the amendments thereto; but neither said commissioners of the sinking fund of the city of Louisville, nor the president nor the attorney thereof, nor all of them together had any

lawful power or authority thus to bind or obligate defendant by the terms, conditions, stipulations or covenants or either of them, contained in said alleged agreement or contract at the time, in the manner or under the circumstances alleged in complainant's bill or otherwise."

Upon a motion for preliminary injunction, therefore, the issue is raised whether those who signed the contract on behalf of the city of Louisville were authorized to bind it thereto. We are of opinion that the city attorney was vested with ample authority to bind the city of Louisville to the contract mentioned in so far as it affected the complainant herein. By section 2909 of the Revised Statutes of Kentucky it is provided that "there shall be elected by the general council, immediately upon the assembling of the new board, a city attorney, whose duty it shall be to give legal advice to the mayor and members of the general council, and all other officers and boards of the city in the discharge of their official duties. If requested, he shall give his opinions in writing and they shall be preserved for reference. It shall also be his duty to prosecute and defend all suits for and against the city, and to attend to such other legal business as may be prescribed by the general council."

The foregoing section makes this officer the retained attorney of the city in every suit brought against it. The question at issue between the banks and the city of Louisville was whether the city could collect license taxes under one of its ordinances. The banks notified the city attorney and the commissioners of the sinking fund whose duty it was to receive the money for the benefit of the city that they intended to resist the collection of the tax by litigation. It was the duty of the city attorney under the statute above set forth to take charge of the litigation thus about to be brought. It was his duty as the attorney of the city to save, so far as he could without prejudice to the city's interests, costs which might be accumulated should suits to the number of twenty be brought and won by the banks against the city. It seems plain to us that it was within his general authority as attorney to make an arrangement with the intended litigants, by which the litigation to be brought should be reduced in volume to as few cases as possible by means of a stipulation that all the suits involving the same questions should abide the result in one suit to be brought. We think that such a stipulation was a mere step in the management of the litigation and was entirely under the control of the attorney retained for the suits. It did not work to the prejudice of the city in the slightest. Had the suits actually been brought, a stipulation between the city attorney and the attorneys for the banks of this character would have been as clearly part of the ordinary management of the suits as any other arrangement for expediting their trial. No material distinction can be suggested between the power of the city attorney to make an agreement of this character with respect to intended suits and suits actually filed. The control that an attorney has by virtue of his office over the suit in which he is employed is very wide in respect to those matters that relate to the progress of the suit and the mode of reaching a conclusion

and which do not deprive the client of a full opportunity to be heard by his attorney on the issues raised in the case. Such authority inheres in the relation between an attorney and client in respect to litigation and the authorities fully sustain this conclusion.

In *North Missouri R. R. Co. v. Stevens*, 36 Mo., 150, the plaintiff railroad company brought several suits against different stockholders in which the questions were precisely the same. The attorneys for the respective parties entered into a written agreement stating that as the same facts arose in all the cases they would abide by the judgment that should be rendered in one of them and that a like judgment should be rendered in each of the several cases. It was contended in that case that the attorneys who made the agreement had no authority to make the agreement and that it was void. The court sustained the agreement as within the authority of the attorneys. It said:

"The arrangement in this case is not a compromise according to the usual acceptation of that term, for that generally applies to releasing a part of the debt, taking land instead of money, or changing the nature and character of the thing to be recovered; it comes nearer within the general management of the case."

In *Ohlquest v. Farwell & Co.*, 71 Iowa, 231, a client was a party to two suits involving substantially the same question. It was held competent for his attorney to bind him by an agreement that only one of the cases should be tried, and that the judgment resulting from such trial should determine the kind of judgment to be entered in the other case. In delivering the opinion of the court, Judge Beck said:

"It is undoubtedly true that an attorney cannot consent to a judgment against his client or waive any cause of action or de-
41 fense in the case; neither can he settle or compromise it without special authority. But he is, by his general employment authorized to do all acts necessary or incidental to the prosecution or defense which pertain to the remedy pursued. The choice of proceedings, the manner of trial and the like, are all within the sphere of his general authority, and, as to these matters, his client is bound by his action. These rules are conceded by counsel in this case. It cannot be doubted that under them counsel for parties in several suits, involving the same issues, may, in the exercise of their general authority, consent to the consolidation of all for trial, or stipulate that the trial of one shall determine the others. This pertains to the remedy pursued—to the manner of trial—and is not an agreement for judgment or a compromise. The parties are not deprived of a trial, nor is judgment rendered by consent. The counsel simply assent to a trial in a particular manner; that one trial shall settle the same issues in several cases. This is just what was done by the counsel for Becker in this case. The form of agreement is that judgment in his case should follow a trial in another action. This is not an agreement for a judgment, but in effect an agreement for a manner of trial."

See also *Eidan v. Finnegan*, 48 Mo., 33; *Gilmore v. American Central Ins. Co.*, 67 Cal., 366.

In Thompson on Trials, 1st vol., section 195, the author says:

"Where several cases are pending in court, depending upon the same facts or questions of law, it is competent for the attorneys in virtue of their general retainers, to stipulate that only one shall be tried and that the others shall abide the result of that one."

We think therefore, that in so far as the issues arising between the banks not actually engaged in the litigation and the city of Louisville were the same as in the three suits which were brought as test cases, the contract made by the city attorney was binding upon the city.

The next question is whether the contract made enables the complainant bank to claim the benefit of the estoppel of the judgments thereafter rendered. We think it does. In *Patton v. Caldwell*, reported in 1st Dallas, 419, the action was on a policy of insurance. Counsel for plaintiff offered to read in evidence a special verdict that had been given in another action against a different underwriter. This was objected to on the ground that the verdict was given between other parties and therefore not admissible; upon which an agreement of all the underwriters to be bound by one verdict was proven.

McKean, chief justice, said:

"The defendant had no opportunity of cross-examining, upon the former trial; and the answer is, that he, with the rest of the
42 underwriters, had agreed to be bound by one verdict; which is certainly the only ground for offering the evidence proposed by the plaintiff's counsel.

Whether this agreement was made in person or by a broker mutually employed, it is equally binding on the parties; and, under the agreement, all the underwriters were fully entitled to interfere upon the former trial, and to cross-examine the witnesses then produced. Although, therefore, we should not have allowed the special verdict to be read, without full proof of the agreement; yet, on receiving that satisfaction, we think it would be unfair to suppress it; and, for the future, we desire, that all such agreements may be entered on the records of the court."

The court then held that the verdict thus offered was not conclusive. As this latter proposition, however, is in conflict with the rule laid down by the Supreme Court of the United States in a recent case of *South Pacific R. R. Co. v. United States*, 168 U. S., 1, that part of the decision cannot be regarded as authority here.

In *Brown, Russell & Russell v. Sprague*, 5 Denio, 545, several ejectments were pending between one claiming title and persons having only the naked possession of the lands. An agreement was made between all the parties that the suits should be stayed and await the event of a suit between other parties in which the same questions arose. It was held that a judgment in that suit would operate as an estoppel between the parties to the agreement.

Mr. Freeman in his work on Judgments says, section 174:

"Neither the benefit of judgments on the one side, nor the obligations on the other, are limited exclusively to parties and their privies. Or, in other words, there is a numerous and important class of per-

sons who being neither parties upon the record nor acquirers of interests from those parties after the commencement of the suit, are nevertheless bound by the judgment. Prominent among these are persons on whose behalf and under whose direction the suit is prosecuted or defended in the name of some other person. * * * The fact that an action is prosecuted in the names of nominal parties cannot divest the case of its real character, but the issues made by the real parties, and the actual interests involved, must determine what persons are precluded from again agitating the question, and who are estopped by the previous decision. Whenever one has an interest in the prosecution or defense of an action, and he, in the advancement or protection of such interest, openly takes substantial control of such prosecution or defense, the judgment, when recovered therein is conclusive for and against him to the same extent as if he were the nominal as well as the real party to the action.
43 * * * Where one seeks the benefit of an estoppel by judgment on the ground that he was the real party in interest in an action, he must show that he conducted the action or defense openly, to the knowledge of the adverse party and for the protection of his own interests."

These principles are sustained by the cases cited by that learned author. See *Cole v. Favorite*, 69 Ills., 457; *Wood v. Ensel*, 63 Mo., 193; *Executors of Tate v. Hunter*, 3 Strobhart, 136–140; *Palmer v. Hayes*, 112 Ind., 289; *Gill v. United States*, 7 Court of Claims, 522, 526. See also Herman on Estoppel, section 139.

In Greenleaf on Evidence, vol. 1, section 523, the principle is stated as follows:

"But to give full effect to the principle by which parties are held bound by a judgment, all persons who are represented by the parties, and claim, under them, or in privity with them, are equally concluded by the same proceedings. We have already seen that the term privity denotes mutual or successive relationship to the same rights of property. The ground, therefore, upon which persons standing in this relation to the litigating party are bound by the proceedings to which he was a party is, that they are identified with them in interest; and wherever this identity is found to exist, all are alike concluded. Hence, all privies, whether in estate, in blood, or in law, are estopped from litigating that which is conclusive upon them with whom they are in privity. And if one covenants for the results or consequences of a suit between others, as if he covenants that a certain mortgage, assigned by him, shall produce a specified sum, he thereby connects himself in privity with the proceedings and the record of the judgment in that suit will be conclusive evidence against him."

In the case of *Rapelye & Purdy v. Prince & Prince*, 4 Hill, 119, Mr. Justice Bronson, speaking for the supreme court of New York, said:

"When one covenants for the results or consequences of a suit between other parties, the decree or judgment in such suit is evidence against him, although he was not a party."

In the present case there can be no doubt from an examination of the contract and the averments of the bill that the three suits

which were conducted were openly conducted in the interest of all the parties to the agreement with the knowledge and by the consent of the city of Louisville, and that the counsel who appeared for the parties to the records were at the same time discharging their duties as counsel for the other banks who had made the agreement. If any one can be bound by a judgment to which he is not a party, it would seem that the banks here must have
44 been so bound. Had the result gone the other way and a judgment been rendered in favor of the city of Louisville in the cases referred to, it cannot admit of doubt that all the banks would have been bound by the decision. As part of the consideration for the settlement of the litigation in the manner fixed by the agreement, the banks paid to the sinking fund commissoners for the city of Louisville the substantial sum of $150,000. Had the agreement not been entered into, it is certain that the complainant would have obtained formal judgment in a prohibition suit and would now have been in the same position as the Louisville Banking Company. Relying on the binding character of the agreement, however, judgment was not taken in the name of complainant. Equity and justice require that effect should be given to an agreement upon the faith of which $150,000 was immediately paid to the city and a formal judgment was not taken. It is just that inasmuch as the banks would have been bound by a diverse judgment, they shall have the benefit of a judgment which was rendered in favor of their colleagues selected to represent them in the suit. This conclusion necessarily leads to the result that the demurrer to the bill must be overruled and the motion for a preliminary injunction allowed.

And on the 14th day of July, 1898, the following order was entered:

This day came the defendant and filed exceptions to the depositions of H. S. Barker and John H. Leathers and the exhibits filed therewith and to the other documentary and record evidence offered; which exceptions were overruled by the court; to which ruling of the court defendant excepted.

The depositions of H. S. Barker and J. H. Leathers, above referred to, are as follows:

45 The deposition of H. S. Barker, taken by agreement on the 7th day of July, 1898, at the office of Messrs. Humphrey & Davie, situate in the Louisville Trust Co.'s building, at Louisville, county of Jefferson and State of Kentucky, to be read as evidence on behalf of the complainant in an action between The Bank of Commerce, complainant, and S. H. Stone, &c., defendants, now pending in the circuit court of the United States for the district of Kentucky.

Appearances: For complainant, Messrs. Helm and Humphrey; for defendants, Col. H. L. Stone.

Said witness, having been first duly sworn, deposed as follows:

Direct examination by Mr. JAMES P. HELM:

1 question. State your name, age, residence, and occupation.

Answer. Henry S. Barker; Louisville, Kentucky; occupation, attorney-at-law.

2. Are you now engaged in the practice of law?

A. I am not actually engaged in the practice of law now, having been elected judge of the Jefferson circuit court, criminal division, in November, 1897, and qualified as judge the first Monday in January, 1898.

3. What was your occupation in 1893 and 1894?

A. I held the office of city attorney of Louisville, Kentucky, from December, 1887, to December, 1896, continuously, and during all of that time I was also attorney for the sinking fund of Louisville.

4. Were you counsel for the city of Louisville at the time
46 the controversy arose between the city of Louisville and the banks and trust companies of the city of Louisville?

A. Yes, sir.

5. Were you present at a conference which was held in the office of the sinking fund commissioners of the city of Louisville on February 13th, 1894, when there was a conference between Messrs. Barret, Leathers, and Swearingen, members of the clearing-house, and the mayor and certain officers of the sinking fund commissioners?

A. Yes, sir; and at all other conferences that were formal in regard to that matter. There may have been some informal talks concerning the matter in controversy, but in all formal matters where anything was to be done or to be finally agreed to I was a party to the conference.

6. I hand you now a certified copy of the minutes of that meeting, under date of February 13th, 1894, spread upon the records of the sinking fund commissioners, the copy being certified to by J. Moss Terry, secretary and treasurer of the sinking fund commissioners. Said paper is marked Exhibit "Copy." I notice from this copy of the minutes by Mr. Terry that he speaks of certain banks being selected to test the question between the city upon the one side and the banks and trust companies upon the other. Will you please, now, in your own way, just proceed to state how the parties

came to agree to select certain banks to test the question between the city and banks and trust companies?

A. The question that existed between the city of Louisville and the banks and trust companies of the city of Louisville at that time was an old one. Prior to the adoption of the present
47 constitution, under the law familiarly called the Hewitt bill, all of those financial corporations had a contract with the State of Kentucky by which they paid a larger sum into the State treasury than was exacted from other citizens upon similar property, and in consideration of that they were given immunity from all local taxation except upon the real estate in which they carried on their business. The present constitution of the State of Kentucky went into effect September 28th, 1891. By that instrument it was sought to place all property upon a level for the purpose of taxation, and it was claimed and believed by the authorities of the city of Louisville that the Hewitt bill, in so far as it affected the interests of the city of Louisville, had been repealed by the constitution; no legislation, however, was had in favor of the city of Louisville on that subject until the adoption of the present charter of the city of Louisville, which was approved July 1st, 1893, and the revenue bill which was adopted November 11, 1892. These two statutes, it was believed, consummated fully the repeal of the Hewitt bill so far as it exempted banks and other financial corporations from local taxation. Nothing, however, seems to have been done in regard to pushing the banks under the present charter until along in the late fall of 1893, and I presume that that occurred because of the fact that we were engaged in the mayoralty race, which took place in November, 1893. This is a mere opinion, as I have no positive recollection on the subject, but I do know that there were many conferences, formal and informal, mostly the latter, between myself and the counsel for the banks who had been retained, as I
48 well knew. I have said before this was an open question, about which there was no secret; the city authorities knew exactly what the banks claimed, and the banks and their attorneys knew exactly what the city authorities claimed. The matter in controversy between the banks and the city came to a head about November, 1893. About that time, in conference with the attorneys for the banks and trust companies, Messrs. Helm & Bruce and Humphrey & Davie, the litigation being in the immediate charge of Mr. Helm and Judge Humphrey, of these two firms. I knew, as I said before, that they were contending and had contended all the time that they had an inviolable contract under the Hewitt bill with the State of Kentucky exempting them from all local taxation. The city authorities having come to the conclusion that they had the right to tax the banks and other financial institutions of the city, chose to tax them by means of a license upon their gross receipts, and in January, 1894, the general council passed a license ordinance by which the banks and trust companies and title companies were required to pay a license tax upon their gross receipts. On the banks and trust companies the amount fixed was four per cent. of their gross earnings. As soon as this ordinance became a law,

under my direction the various license inspectors of the sinking fund notified each bank and trust company in his district that it would be required to pay the license at once or the ordinary proceedings would be taken against them to force them. This was what is called an ordinance warrant, by which the party is summoned before the police court of the city of Louisville, and if found delinquent on his license a fine is imposed, which is repeated as long as the delinquency continues.

49 This notice was the immediate cause of the conference between the attorney of the sinking fund and the commissioners of the sinking fund and the banks and their attorneys, which resulted in the agreement referred to in the resolution spread upon the minutes of the sinking fund, a certified copy of which has just been handed me by Mr. Helm. When this conference of February 13th, 1894, was held we were brought face to face with the fact that all the banks and trust companies claimed immunity; also that they were divisible into three classes. One class was those banks whose charters had been granted them prior to the act of 1856, with which the court is familiar; those State banks whose charters had been granted them subsequent to the act of 1856, and the national banks, and it was supposed by counsel that the trust companies went into the class of the State banks, whose charters had been granted subsequent to the act of 1856. The attorneys for the banks informed us that they proposed to resist the payment of any tax, license or ad valorem, and to stand upon and contend for their rights under the Hewitt bill; and, of course, unless some agreement was made for selecting and making the test cases, this would result in bringing a suit for each one of the corporations involved, there being from twenty-three to twenty-five, if I recollect correctly. It seemed to us that it would be useless to bring so many suits, entailing a very much larger cost upon the losing side and also entailing a good deal more labor upon the judges who had the matter to decide, and we therefore agreed to select one of each of the natural classes into which these financial institutions divided themselves in regard to their defenses and allow the final

50 judgment rendered in that case to go as to all of that class.

7. If this arrangement had not been made as indicated in the resolution, a copy of which you have referred to, were you given to understand that each one of these institutions would refuse to pay anything and bring its separate suit?

A. Undoubtedly, I was given so to understand, and that result would have been unavoidable, as I would have taken out an ordinance warrant against each one of them, which would have forced them into the police court, and they would have been bound to have defended as many suits as there were institutions delinquent. Now, to save all this, the agreement in regard to the classes was made.

8. Now, as a result of that agreement, will you please state what amount of money was paid into the sinking fund of the city of Louisville by the banks and trust companies?

A. In the year 1894 there was paid into the sinking fund of the

city of Louisville actually $69,191.17 under that agreement. In 1895 there was paid $71,604.11, not one dollar of which would the city ever have gotten but for this agreement.

9. Was the agreement made at the time the banks were selected to test the question between themselves and the city of Louisville ever reduced to writing? If so, will you please state whether the original paper, which I now hand you, is the paper which was executed between the parties?

A. The agreement was reduced to writing, and the paper handed to me by the counsel for the banks in this case is the original agreement as reduced to writing and signed by the parties. I
51 know all the signatures to this paper to be genuine. I file said paper herewith and make it part of my deposition, and mark it for identification Exhibit "A."

10. At the time you signed that paper as city attorney did you have any conference with the mayor? And, if so, you may state whether he concurred with you in the opinion that it was the proper thing to do.

Objected to as incompetent.

A. I had many conferences with the mayor and with the finance committee of the general council of the city of Louisville. This was a most important question to the city of Louisville, and it was the subject of many earnest conferences between the mayor of the city of Louisville and myself and various officers of the city of Louisville. We calculated roughly that these corporations would produce annually, in round numbers, one hundred thousand dollars, a sum which cut a very large figure in the financial calculation of the city and its officials, and it was of the utmost importance to have everything done that would expedite and simplify the contention between these corporations and the city of Louisville; and I want to say just here that, while it does not seem to have been put into any of these agreements, there was a very important understanding between the counsel for the banks and myself, and that was to expedite this litigation as far as it could possibly be done, and which was done and carried out, although it does not seem to have been reduced to writing.

11. You say you had this conference with the mayor and the finance committee of the general council. Did they concur with you in the propriety of entering into this agreement?

52 A. Most fully. I want to say here that this was a most important matter, both to the banks and to the city, and we approached the subject with the view of settling the contention in the most expeditious way possible, and at the same time in a manner that would injure the banks the least. The mayor of the city of Louisville and myself both recognized that litigation such as this was calculated to alarm the stockholders of the banks and might result in a very serious injury, and all of the parties to the litigation—the bankers, through their counsel; the counsel for the city, the mayor and the officers of the city—all approached this subject with a view of doing the greatest good and the least harm possible to the parties

concerned in it. In other words, we approached it, if I may use the term, in a statesmanlike manner, because it was a matter to be treated in that broad and liberal way.

12. Was there any discussion at that meeting of February 13th, 1894, on the part of the officers of the city of Louisville urging the banks and trust companies to pay the whole of the license tax?

A. Yes, and that answer naturally follows what I have stated. The bankers and their counsel were made aware of the fact that the city needed this revenue, and to a certain extent had made calculations based upon getting the revenue, and we urged them to pay at once and not wait until the end of the litigation. Now, the bankers felt as kindly towards the city as the city felt towards the bankers, and they desired to do everything in their power that was consistent with maintaining their claims under the Hewitt
53 bill to serve the interest of the city of Louisville, and the result of that was that they agreed, as is set forth in that resolution, to make a total payment of the money, a part of which was to be paid back if the litigation ended adversely to the city, and a large part of it was to be absolute without reference to how the suit came out after the litigation.

13. Mr. Barker, what was done under this resolution by the banks and trust companies?

A. The provision of the agreement, as shown by the resolution, was carried out to the letter.

14. Were the notes which were given by the sinking fund commissioners afterwards surrendered by the banks?

A. Yes; and all payments made absolute except those of the three banks which were selected to furnish the test cases. As to them, it was thought by counsel that if they surrendered their notes and made their payments absolute the result would be that the litigation would be merely a sham, that there would be nothing actually involved in it, and this would be disrespectful to the court, and therefore the arrangement was not made or carried out as to them.

15. The agreement which you have examined and which I now hand you again, signed by the parties, appears not to have been dated. Can you state about when that agreement was reduced to writing and signed?

A. I have no independent recollection of that matter, but an examination of the paper itself convinces me that it was December, 1894.

54 16. Before or after the second payment?

A. After the second payment—immediately after.

17. Now, state when the second payment by the banks and trust companies was made.

A. In December, 1894. I know that this original stipulation represents truthfully the facts in every particular, and the recitation of the surrender of the notes and the payments being made absolute in it convinces me that it was made after the second payments were made, and I know that it must have been done immediately after, and perhaps was drawn up and agreed to in every detail at the time the payments were made and delivered afterwards.

18. At the time this agreement was reduced to writing had there been any decision rendered either way by any court?

A. Yes; a decision by the lower court had been made and was, except in the cases of the Bank of Kentucky and the Bank of Louisville, adverse to the banks and the trust companies.

19. I notice that the second year the Bank of Kentucky and the Bank of Louisville made no payment to the city, but that all the other banks and trust companies did. Why was that?

A. The reason of that was that the Bank of Kentucky and the Bank of Louisville had charters which antedated the act of 1856, and the lower court in deciding the matter held that they had irrepealable contracts with the State and were exempt from local taxation, and therefore they did not pay the second year, as the decision was in their favor, that being the contract and the contract being carried out by all the parties as the litigation proceeded.

55 20. The other banks and trust companies continued under the agreement to pay until the final decision?

A. Yes, sir.

21. And they paid the second year?

A. They paid the second year.

22. The case having been decided in June of 1895?

A. Yes; that is true.

23. Mr. Barker, did you represent Judge Thompson in that litigation?

A. Yes, sir; I represented all that side.

24. How did you happen to represent Thompson?

A. Well, that was the way to represent the city, and I got Judge Thompson's permission to do so.

25. In order to protect the interests of the city?

A. In order to protect the interests of the city. The writ of prohibition against Judge Thompson was only taken out to test this case and carry out this agreement, and I made known the fact to Judge Thompson, and he, of course, turning the matter over to me, I had absolute charge of that whole side.

Cross-examination by Col. H. L. STONE, city attorney:

26. Your employment as attorney by the commissioners of the sinking fund was as any other attorney would be employed and was not dependent upon the fact that you were city attorney of the city of Louisville?

A. I was regularly employed by the commissioners of the sinking fund—elected as their attorney.

27. They employed an attorney each year, did they, and
56 you were selected each year on a salary?

A. No; I was elected only once and continued during the nine years I was city attorney; there was no change made in that time.

28. You were paid a salary in that capacity?

A. Yes, sir; paid a salary each year.

29. The license tax sought to be collected under the license ordi-

nance of January 29th, 1894, all went to the sinking fund, did it not?

A. Under the charter all license goes to the sinking fund, that being the revenue of the city set apart to pay the bonded indebtedness of the city.

30. Is it not a fact that the license tax fixed in the ordinance of January 29th, 1894, against banks and trust companies was in lieu of any ad valorem tax on the personalty of banks and trust companies for the year 1894?

A. Yes, as the levy ordinance for the year 1894 will show.

31. In the resolution of February 13th, 1894, of the commissioners of the sinking fund, a copy of which you have made a part of your deposition, I see it stated that the banks, with two or three exceptions, were allowed to enter into an arrangement. What two or three exceptions were those?

A. Well, I think I can recollect one, but I am not sure that I can recollect the others; one was the Fourth national bank, I am quite sure.

32. You don't remember what other institutions, whether a bank or trust company, compose the remainder of the exceptions?

57 A. Well, no trust company composed it; I feel quite sure that none of the trust companies were in the exceptions, and the Fourth national bank was the only one I can remember.

33. If that was the only one, why was the clause inserted, "two or three exceptions"?

A. Well, I cannot at this time remember.

34. Was there ever any resolution or proceedings on the part of the commissioners of the sinking fund with respect to this matter, or delegating any authority to you in the premises, except that of February 13th, 1894?

A. I suppose that that is the only formal resolution that was ever entered upon the minutes of the board in regard to the matter, but it was discussed between the commissioners of the sinking fund and myself many times.

35. That resolution is the only corporate action, then, that is on the journal of the board of sinking fund commissioners, that you know of?

A. Yes, sir.

36. Was there any corporate action of the city of Louisville, by resolution or otherwise, passed by the general council of the city of Louisville delegating to you authority to go into any agreement with the banks in respect to the rights of the city and the banks and trust companies?

A. No; there was no resolution or ordinance passed by the board of the general council authorizing me to do that; I did not think it was necessary that there should be; I thought then, as I know

58 now, I had full authority as attorney for the city to make the agreement, and acted upon that supposition, rightfully or wrongfully.

37. Henry S. Tyler, as mayor of the city, was also *ex officio* member of the sinking fund commissioners?

A. Yes, and also the president of the board of aldermen was a member of the board of sinking fund commissioners.

38. I notice in the resolution of February 13th, 1894, that nothing is said about ad valorem taxes; the agreement which you say you signed subsequently does speak of ad valorem taxes and purports to be an agreement that the results of those prohibition suits should determine the rights of the city with respect to the ad valorem tax also. In the absence of any other resolution or proceeding on the part of the sinking fund commissioners or general council of the city, how was it that the ad valorem taxes were to be determined by the license-tax suits?

A. Well, we looked at that as lawyers, I presume, and that was that there was a question between the city and the banks, and that the question was whether we could tax them at all or whether they has an inviolable contract, and if they had an inviolable contract *was* could not tax them at all, and if their contract was a repealable one we could tax them either or both ways, and that difference in the verbiage, as I regarded it, was entirely immaterial.

39. Do you know who prepared this written agreement which you signed without date?

A. No; I do not remember who reduced it to writing, but the matter was all fresh in our minds, and it had been carried out to the letter, as we all understood it, and there was no contro-
59 versy about the details of the agreement.

40. Do you know why it was left undated?

A. No; I do not. You can see that it was acted on before it was reduced to writing, and I can only say that that was the result of the absolute confidence that existed between the city attorney at that time and the counsel for the banks. Whatever they said to me I relied on implicitly, and I know whatever I said to them they relied on with equal certainty.

41. Who presented that agreement to you for your signature?

A. I do not remember now but one independent circumstance, Colonel, and that was that Mayor Tyler did not sign it. He, having to go somewhere, told me to sign it, but I presume that they were all present except the mayor.

42. That agreement purports to be entered into by the mayor of the city, as I understand it. Did Mayor Tyler or any one as mayor of the city ever sign that agreement?

A. No; as I told you, that was the only independent circumstance that I remember now. Mayor Tayler had to be absent, and I remember distinctly of his so saying that he could not be present and told me to sign it.

43. I have not asked what he said, but simply the facts.

A. I am giving you the reason the signature does not appear there.

44. How long was he absent from the city?

A. I don't know that he was absent from the city at all. He was to be absent at the time that paper was to be signed.

60 45. Was there any reason why he did not sign it subsequently when he had the opportunity?

A. None except the fact that the bankers and their attorneys knew that that paper was signed in absolute good faith and would be carried out in absolute good faith by Mayor Tyler and myself. As I said to you, these gentlemen had had many conferences, both with Mayor Tyler and myself, and they knew what he thought and knew how he regarded this matter, and all of that was *a*, *b*, *c* to us.

46. If this was to bind or be an obligation of the city of Louisville, then why was it not signed by the mayor, signing the city of Louisville, by him as mayor?

A. Well, as I said, that Mayor Tyler, had he been present, would have signed it, but I did not think that was necessary and do not think so yet.

47. Mayor Tyler died in January, 1896, did he not?

A. Yes.

48. If this original agreement was reduced to writing and signed as far as it is, as you now recollect, shortly after December, 1894, Mayor Tyler had about a year to sign it in before his death, did he not?

A. Yes; that is about the time between those dates.

49. Do you know who took charge of this original agreement and has had custody of it since you signed it?

A. I suppose the banks have had it. I am surprised that a copy of that was not left with the sinking fund, spread upon the minutes, and, as I say, if we had been dealing at arm's-length with each other it would more than likely have been done so, and the mayor's signature would have been there; but this having been drawn up in pursuance of an agreement made before and lived up to, and carried out in every detail up to the time that was written, and nobody seeking to draw away from it, and no expectation that they would draw away from it, that superinduced the laxity that seemed to have prevailed in regard to the agreement.

61

50. I will ask you to state, if you can state now positively, if this original agreement, which you did sign, was executed before the decision of the court of appeals by Judge Pryor June 1st, 1895.

A. Most assuredly it was, and before Mr. Tyler died.

51. What enables you to state that?

A. Every fact in it shows it.

52. What fact shows it?

A. The fact that the mayor agreed that he would sign it and I know it to be true, and I would have remembered it distinctly, and in the second place I know the banks would not have agreed to it afterwards and there would not have been any sense in executing it afterwards.

53. Point out anything in the body of that contract that indicates it was signed before June 1st, 1895.

A. I do not need to look at that. I know that it was signed before. I remember that it was signed before, in Mr. Tyler's lifetime. I remember, as I told you, that he could not be present and asked me to sign it.

54. Did he tell you to sign his name or the city of Louisville to it?

A. No; he told me to execute it, and I did execute it as an agreement theretofore made and theretofire in a large part carried out.

62 55. This closing paragraph of this original agreement first speaks of the terms and conditions named by the minutes of the sinking fund commissioners February 13th, 1894, and then says: "But at a later date, and in further reliance upon said agreement, all said banks and companies except those actually involved in the test cases paid the whole of the amount of taxes claimed as against them by the city of Louisville without reservation until the question thus raised should be finally disposed of." Now, if this document had been prepared immediately after December, 1894, when you say the absolute payments were made, why was it that that time is referred to as a "later date" instead of giving the date which was immediately preceding the execution of this document?

A. Well, it was about a year. I don't consider that so immediately preceding it.

56. If it was in January, 1895, that this was executed, it would be only a month or two, wouldn't it?

A. I didn't say '95: I said December, '94.

57. The payment or agreement?

A. The payment and agreement.

58. Why was it referred to, if the payments were made contemporaneously, which were absolute, in this language, "at a later date"?

A. That refers to the first payment, in the spring in that year. It was in February, and February, 1894, is nearly a year from December, 1894. They were not all absolute in the first payment. At a later date those were made absolute as well as the others, and making all those payments absolute and the surrender of these notes was a

63 concession on the part of the banks and trust companies, making them absolute in December, 1894. The original agreement did not contemplate that state of facts at all. They had a right to make the second payment, if the agreement had been enforced on their part against the city, just as they made the first, but upon my representation of how the city's finances were becoming entangled they conceded that to the city of Louisville.

59. They made a donation, you mean, to the city.

A. You may call it whatever you please. I call it a concession. Yes, you could call it a donation.

60. Did the city enter into this original document in consideration of that?

A. What do you mean by the original document?

61. The one that is undated.

A. Well, I can't say that; undoubtedly that simply represents the original agreement. The original agreement, Colonel, was made in January or February of 1894. That did not contemplate that. That contemplated just what the resolution states. They should make part absolute and part should be determined by the end of the

litigation. Now, when we came to the latter part of the year, seeing that the city's fiscal affairs would be thrown into confusion, I said to the counsel who represented the banks that the city was becoming entangled, that I was not willing to go on at that rate, and I may explain that in this way: It was of the utmost importance that the city's bonded indebtedness should be cared for; that it should, with scrupulous fidelity, meet the yearly interest as it fell due and pay it; and perhaps it would not be out of place here to say that in all of its corporate existence the city of Louisville had never been behind in the payment of its interest an hour, and we passed through all
64 sorts of financial panics, and that inasmuch as the license was set apart to take care of the bonded indebtedness of the city of Louisville and its annual interest, it was of the utmost importance that the sinking fund commissioners should know exactly what it had each year. As this litigation commenced to grow out and we could not see exactly where we were going to land, I said to these attorneys, "I want these payments made absolute," and at the end of the litigation, of course, if they won they would have the exemption, but all payments before that they would lose, and they conceded it to the city.

62. What did the city give in return, in the way of consideration, for these absolute payments which were subsequently made? What concessions did the city make, if any, and the sinking fund commissioners? Was the original agreement or conditions or terms altered in any way?

A. No; only in that instance they agreed to pay absolute.

63. That was on the part of the banks. What concession did the city or sinking fund commissioners make?

A. There wasn't any.

64. Nothing on the part of the city or the sinking fund commissioners?

A. None in the world. The bankers were interested in upholding the credit of the city of Louisville. They were large holders of its bonds, and were interested in upholding its credit; very much more so than any other class of citizens we had. They saw exactly our position, and, as I stated before, they approached the subject in somewhat of a statesmanlike manner.

65. Can you give any good reason why this agreement was
65 not reduced to writing at the start instead of being put off and left in a verbal and indefinite condition for a year or more?

A. I can give you a reason. I don't know whether it would be a good one. I think I have already given it. The banks relied on me and I relied on their attorneys. There was no question but what it would be enforced to the letter as between the attorneys and myself, and if we had won I would have expected every one of those corporations to step up and pay.

66. They would have had to by law, wouldn't they, without any agreement about it?

A. Yes; but I mean I would have expected them to have done it without any litigation. I would have expected that to have settled

the questions between us. I would not have expected, in other words, any plea of the statute of limitations or anything of that sort to be injected in the case.

67. In this undated agreement the trust companies are classed with the State banks which were chartered after 1856; was it understood by you at that time, or was it your view, that they were properly classed on the same footing as banks chartered after 1856?

A. I don't know that it was absolutely my opinion; if they were entitled to fall in that class they would be in that class, but I don't think that I had in my mind any particular distriction between the trust companies and the banks, but that any weight was attached to that in my mind I cannot say now, because I do not remember.

68. You undertook, also, to put in the same class all banks chartered after 1856, whether they had been chartered or obtained
66 extensions of their corporate existence after the year 1887, or the period in which the Hewitt bill gave banks the right to accept its provisions?

A. Colonel, you have to take that agreement at just what it recites, as far as I am concerned, because I did not go into that at all.

69. I will ask you to state whether or not the terms of this agreement have been abided by or violated by any of the banks existing in the city of Louisville when it was entered into; if so, what banks and in what way.

Objected to.

A. Well, I don't know anything on that that the records will not show you fully. Some time after the first decision by the court of appeals four banks brought suit against the city of Louisville to recover the money they had paid under the agreement. I want to state that the counsel who represented the banks and who made the agreement with me were not the counsel who brought those suits, but, on the contrary, they refused to bring them, and all of them have assured me that they were ready to give any evidence they could that would enable *ne* to defeat those suits. The banks in question were the German bank, the Western bank, the German Security bank, and the Louisville City national bank. All of these suits are, of course, public records and will show for themselves what they claim and by whom they are brought.

Answer objected to.

70. There has been no final determination of those suits yet?

A. I don't know; there had not been at the time I *caesed* to be city attorney of the city of Louisville.

71. I notice that the Bank of Louisville paid its license in
67 1894. I will ask you to state if that was not done before there was any resolution of the sinking fund commissioners or before any arrangement was made with the banks at all, of the kind you mention.

A. I have no independent remembrance of the exact date upon which the Bank of Louisville paid its license in 1894, but I have before me a sheet drawn off from the books of the sinking fund of

Louisville, which I am sure is correct, which shows that the Bank of Louisville, on the 20th of February, 1894, paid the sum of $2,036.26, and I have no doubt that the date and amount are correct. The resolution is dated the 13th day of February, 1894, which is seven days before the payment.

72. Is it not a fact that subsequent to the payment of these amounts by the several banks and trust companies to the sinking fund commissioners as license tax that the city of Louisville adopted an ordinance giving credit by all amounts paid by parties as license upon their ad valorem tax bills upon the same personal property employed in their business for the fiscal years of 1894 and 1895?

A. The license ordinance which contained the provision authorizing the license tax, in lieu of the ad valorem tax, applied to many other kinds of business besides that of banking and the business of carrying on trust companies. Now, when the banks obtained the decision on the question of the Hewitt bill, the inviolability of the Hewitt bill, so far as they were concerned, they were struck out of consideration by the city authorities, but the court of appeals, in the
case of Levi, &c., against The City of Louisville, held that the
68 provision providing for a license system in lieu of the ad valorem system was void, and in that opinion it was stated that in levying ad valorem tax credit should be given by the amount of the license tax paid under the ordinance, and the ordinance which you have referred to was drawn by me and passed by the general council to carry out that statement or requirement in the opinion of the court of appeals in the case mentioned.

73. The ordinance allowing credit for license tax paid on ad valorem tax bills is without exception, isn't it, and embraces all parties? I refer to the ordinance entitled "An ordinance providing for crediting ad valorem tax bills on personalty by the amount paid to the sinking fund as license on same," approved August 6th, 1895.

A. That is the ordinance in question, and undoubtedly is general in its terms. Of course, it could only have reference to such license as was paid in the ordinary way, and, of course, could not have any reference to license paid to be absolute under agreement.

74. There is no exception, though, in the ordinance, which is prepared on that subject and which was adopted?

A. No. At the time that ordinance was passed, so far as I knew and believed, the questions between the city of Louisville and the banks were settled until the expiration of their various charters.

75. In this undated agreement which you signed I see that it refers, in the outset of it, as being executed under the authority of the board of sinking fund commissioners, given at a regular meeting of said board; had that reference to the meeting of February 13th, 1894?

A. I presume that that is true; that seems to be the sense
69 of it, and, although it is not on the minutes, this paper was signed by the president of the board of commissioners of the sinking fund with the full knowledge of the board.

Defendant excepts to the answer on the ground that the minutes of the board show the acts of the board.

76. I see in the resolution of February 13th, 1894, the president of the sinking fund commissioners was authorized to enter into "the following arrangement with the different banks, &c.," and then the arrangement seems to have been set forth in four paragraphs. I will ask you to state if you have any knowledge of any other arrangement or agreement the president was authorized to make or enter into with the banks, &c., than that set forth in the resolution of February 13th, 1894, or of any other authority on the minutes of said board.

A. I don't know what the minutes show, as I am not the custodian, but I believe the minutes only show the resolution you refer to, but there were many conferences and talks on this subject which perhaps were not reduced to writing and not put in a formal resolution. Now, this arrangement, this whole arrangement, in every detail was fully authorized by the board. They knew of it; every member of the board knew it, and it was so manifestly to their advantage that there cannot be the slightest question but what they authorized and agreed to every part of it. It was a one-sided agreement, so far as I considered it, in favor of the city authorities as against the institutions.

Defendant excepts to all of the answer that is not responsive to the question or relates to any conference or alleged authorities or agreements not shown by the journal of the board of sinking fund commissioners.

70

77. Why is it that instead of the president of the sinking fund commissioners execution the agreement contemplated by the resolution of February 13th, 1894, he simply approved the agreement entered into between you and the attorneys for the banks?

A. I presume that he considered that that was the same thing; that what he did was the execution of it.

78. I will ask you to state if that agreement, which bears no date, signed by you, was ever presented at a regular meeting of the board of sinking fund commissioners and approved or ratified by that board.

A. Yes; and it was signed at a regular meeting by me.

79. Does the journal of the board of sinking fund commissioners show any such state of fact as that?

A. I don't know, but it was lying on the table and signed by me right there in their presence.

80. Would not the secretary of the board of sinking fund commissioners know of that fact if it had been there?

A. I don't know that he would have remembered it.

81. Will you give the date of any such alleged board meeting when a majority of the commissioners were present and this was presented for ratification or approval?

A. No; I don't remember the date.

82. Will you name the commissioners that were present on that occasion?

A. No; I cannot. I can name Mr. Gibson, and I feel pretty sure that Colonel Ray was there. The others I cannot name. I want to

state to you that there were many regular meetings of the
71 sinking fund commissioners of which there are no minutes at which very important questions were discussed, and this was one of them. It is very easy to get a quorum of the sinking fund commissioners. Mr. Gibson, who was the president, was living within one hundred yards of the city hall; the mayor, a member of the board, was back there in the city hall, and nearly all the commissioners were men of prominence and doing business within a short distance of the city hall and could be gotten there with the telephone, as was frequently the case, within five minutes after it was desired they should have a meeting, and it was the constant habit to have just such meetings as that called over the telephone and arranged for in five minutes after it was desired to hold it.

Defendant excepts to the answer in so far as it refers to any meeting not shown by the journal of the board.

83. If there had been any regular meeting of the majority of the board of sinking fund commissioners to take into consideration this agreement which you signed in a matter of this importance would it not have been spread upon the journal of that board or some reference have been made to it in the minutes of that board?

A. I did not say a regular meeting; I said a meeting.

84. Well, a special meeting, then, where there was a majority of the commissioners to take this subject into consideration?

A. Not necessarily.

85. Was the secretary of the sinking fund commissioners furnished with even a copy of this undated agreement at any
72 time to take care of or preserve as part of the records of that board?

A. I don't know.

86. Did the general council of the city of Louisville, by resolution or otherwise, ever approve or ratify this agreement which you signed as city attorney?

A. No; it was not submitted to them as a body.

87. Was a duplicate or copy of it ever filed in either of the three cases that were brought by prohibition proceedings on the warrant under the license ordinance.

A. No; I reckon not. I don't suppose the gentlemen would have thought that necessary after we had told them it would not be.

88. Was there any statement giving the names of the several banks, State and national, and trust companies as being parties to or having any right or claim under this undated agreement furnished to the board of sinking fund commissioners of the city of Louisville or preserved by you in any way?

A. I can only state in answer to that what I have said before: This being a public question, we knew that these gentlemen represented all or nearly all of these corporations; that they had employment; the banks and trust companies had had many meetings about this matter; they had taken advice; they had employed their counsel, and I am somewhat surprised to know that there was any

of them excepted, because if you had asked me, without showing me this agreement where it recites that there were two or three that did not go into it, I would have said they were all in, because I supposed that Humphrey & Davie and Helm & Bruce represented them all, and the fact that these two or three are not in
73 it only goes to show that the counsel for the banks were scrupulously particular to state the exact facts as to their employment, because I supposed all the time that they represented every one of them.

89. You have already said you knew the Fourth national bank was not included?

A. Yes; with the exception of the Fourth national, you are correct, and I am glad you called my attention to it. I did know that was one. I remember distinctly to have made complaint to the counsel, at least one of the counsel for the banks, about the position of the Fourth national, and I remember they disapproved of the position the Fourth national took, and that incident is why I remember it as not having been included in the agreement, but I do not remember that any others were omitted.

90. It was left, however, to the recollection of yourself or counsel claiming to represent the banks and trust companies as to what banks or trust companies were entitled to claim under this agreement. In other words, there is no record preserved, either in the agreement itself or otherwise, as to what banks and trust companies could claim under it?

A. We had the best record in the world, Colonel; we had their money; every one of them paid while the agreement was in our mind, and the record shows exactly who was in it; it shows who paid and who did not and when they paid, and it shows the amounts they paid.

91. Do the minutes or records of the board of sinking fund commissioners show that those who paid their license, the amount,
74 into the treasury of that board were entitled to claim under this agreement, or does it make any reference to this agreement?

A. Perhaps not in so many words, but the agreement we made with the counsel was to be executed, and was executed, at once or within a very short time. Of course, there was some little straggling about the payments; some of the banks did not pay as early as others, but they paid right along, as you can see by an examination of the books of the sinking fund.

92. If I understand you, the Fourth national bank paid nothing to the sinking fund commissioners of the city of Louisville under the license ordinance of January 29th, 1894?

A. No, sir; and did not go into the agreement.

93. If I understand you, by the terms of this agreement, as you understood it, as finally agreed on at a later date than in February, 1894, whatever that date may have been, all these banks that were entitled to claim under this agreement were to pay or were bound to pay the full amount of the four per cent. on their gross earnings absolutely for the years '94 and '95 to the sinking fund commis-

sioners in order to be entitled to the provisions of the agreement, except the three banks that brought suit?

A. Yes; undoubtedly.

Redirect examination:

94. You have spoken of the first payment under that resolution of February 13th, 1894, being for the taxes of 1894. Will you state whether that is for the taxes of the year '93–'4, being the first year's taxes under the new organization?

A. It was for the first fiscal year's taxes; our fiscal year
75 commences on the first day of September and the fiscal year would be from the first of September of each year until the 31st day of August of the next year.

95. And the first fiscal year would be from the 1st of September, 1893, to the 31st of August, 1894?

A. Yes, sir.

96. You have been asked about what banks and trust companies entered into and became bound by that agreement. I will ask you whether the records which you have taken from the office of the sinking fund commissioners show which of these institutions paid on the strength of that agreement, and will ask you to call off the names.

A. I have a sheet drawn, at my request, from the books of the sinking fund of Louisville, which shows each and every financial corporation that went into this agreement and paid under it and was entitled to the benefits of its provisions, and I will read them as follows:

The Bank of Louisville, the Kentucky Title Company, the German Security bank, Bank of Commerce, the Kentucky national bank, Second national bank, the Louisville City national bank, the German bank, the Farmers' & Drovers' bank, the Western bank, German Insurance bank, the Fidelity Trust and Safety Vault Company, the Louisville Trust Company, the Third national bank, the Kentucky Trust Company, the Columbia Trust Company, the Union national bank, the Germania Safety Vault and Trust Company, the German national bank, the Citizens' national bank, the Merchants' national bank, the Dime savings bank, First national bank, the Bank of Kentucky, the Louisville Banking Company, and the Third national bank.

76 97. You have stated that they were all entitled to the benefit of that agreement. Do you mean by that that such of them as would be able to show that they accepted in due time the provisions of the Hewitt bill were entitled to it?

Objected to.

A. That is shown in the agreement; the agreement shows the exact facts.

98. Does the paper taken from the books of the sinking fund commissioners, to which you have referred once or twice, indicate that the commissioners of the sinking fund had executed the notes to the several banks, as provided for in the agreement, except in the

few cases where the absolute payment was in excess of the four per cent. of the gross receipts?

A. Yes, sir.

99. You have also stated that four of the banks had, after the decision of June, 1895, brought suit to recover from the city the amount which they had paid in under that agreement. Were you then the counsel for the city?

A. Yes, sir.

100. Did you defend those suits?

A. I did.

101. What was your defense?

A. I set up this agreement, as the records will show. I don't know whether those suits were brought against the city at all or not; they may have been, and probably were, against the sinking fund, but, as attorney for the sinking fund, I set up as a defense this agreement. I pleaded the agreement in defense of the suit.

77 102. Have any of the banks ever pressed those suits since that time?

A. I filed the answer of The Sinking Fund or of The City of Louisville, whichever was the defendant, or the answer of both, if both were made defendants, as is sometimes the case, and pleaded the agreement of which I have been talking in this deposition in bar to the right of recovery. A demurrer was entered to the answer making this plea and the demurrer overruled in each case. That, I think, is as far as the litigation ever progressed, but, of course, the records themselves will show.

Recross-examination:

103. Don't you recollect that the answers in those cases were either denied by formal replies or controverted of record after the demurrer was overruled and the issues were thus made up?

A. I believe that the counsel is right and that my recollection was in error and that there were depositions.

104. Now, what bank took depositions and whose depositions were taken, as far as you recollect?

A. I cannot say. This is a matter that has sprung up during the taking of the deposition, about which I have not thought at all, and perhaps I ought not to have made any statement with reference to it at all, as the records will show absolutely the correct facts.

105. Don't you remember, however, independently of the records, that one or more of the banks took depositions and whose depositions were taken?

A. I remember one deposition was taken. That was Mr. James S. Barret's, the president of the German Security bank. It was

78 taken at the office of his counsel, Messrs. Barnett, Miller & Barnett, and I believe that they did deny in each case the agreement, but as to that the records will show.

106. You don't now remember the name of any other witness whose deposition was taken in either of the cases?

A. No; I do not, or whether there were any others.

107. Do you know whether the deposition of Mr. Barret, in the case of the German Security bank, has ever been filed?

A. I do not.

108. Do you know what examiner or notary took it?

A. I feel quite sure that the stenographer in Barnett, Miller & Barnett's office took it.

The witness, H. S. Barker, upon his own motion, makes the following additions and corrections to his deposition after it was written out and he had read it over:

After having read my original deposition in this case, I desire to make the following additions and corrections thereto, having first seen the counsel on both sides and explained to them wherein I desired to amend my deposition and they all agreeing to it:

First. I was in error in saying that a demurrer had been filed by the plaintiffs in the four suits brought by the banks after the first decision of the bank-tax question in the court of appeals to the third paragraph of the answer. On the contrary, there was no demurrer filed, but by agreement of counsel all affirmative allegations were controverted of record, as may be done under our code practice.

Second. In answer to Colonel Stone's question as to what stenographer took the deposition of James S. Barret in the case
79 of *of* The German Security Bank against The Sinking Fund of Louisville, I stated that I thought the stenographer in the office of Barnett, Miller and Barnett took said deposition. In this I was mistaken. The deposition was taken by Charles A. Graham, official stenographer of the common pleas division of the Jefferson circuit court.

Third. While my answer to cross-question sixty-four is true so far as it goes, I feel that it does not fully state the reasons for the concession made by the banks in favor of the sinking fund of the city of Louisville to the extent of making all payments of license under the agreement absolute, and as a part of my answer to said cross-question sixty-four I desire to incorporate the third paragraph of the answer of the sinking fund of Louisville to the petition in the case of The German Security Bank *vs.* The Sinking Fund of Louisville. This third paragraph was drawn by me two years ago, when the whole matter was very much fresher in my mind than now, and I believe that it fairly sets forth all of the facts and circumstances connected with the modifications of the city of Louisville and the *city of Louisville and the* sinking fund of the city of Louisville, and I refer to said third paragraph and make it a part of my answer to question sixty-four and request the stenographer to copy it in full. The same paragraph occurs in the answer to each of the four suits and are identical in substance, except that the amounts sued for and necessarily referred to in the third paragraph are different in each case, but the body of the paragraph and the history of the transaction is the same in each.

80 Said paragraph referred to by the witness is in words and figures as follows, to wit:

"For further answer herein to both paragraphs of the petition, the defendants say that after the passage of the ordinance set out in the petition assessing the banks the plaintiff and all the banks and trust companies of the city of Louisville entered into a combination and jointly employed counsel to test their rights under the contract with the State of Kentucky as contained in the act known as the Hewitt bill; that by agreement with and at the instance of counsel for plaintiff and the other banks and trust companies in the city of Louisville these defendants, in order to make test cases wherein might be decided the respective rights of the city of Louisville to tax the banks and the rights of the banks under the contract set forth in the 'Hewitt bill,' sued out three warrants in the city court of Louisville, one against the Bank of Kentucky, another against the Louisville Banking Company, and another against the Third National Bank of the City of Louisville, whereupon the said three banks last named, by their said counsel, instituted three separate actions in the Jefferson circuit court against R. H. Thompson, judge of the city court of Louisville, and the city of Louisville, wherein it was claimed that the ordinance in question was void, and praying that the said city of Louisville and the said R. H. Thompson, judge of the city court of Louisville, be prohibited from prosecuting said actions against said banks. It was then and there agreed that the judgment of the court in these three actions should be the judgment as to the rights of all the banks and trust companies in the city of Louisville. In order to
81 effect this agreement with the city of Louisville and the sinking fund commissioners of the city of Louisville, and as a consideration for the same it was then and there agreed between the city of Louisville and the board of sinking fund commissioners of the city of Louisville and the plaintiff and all of the other banks and trust companies of the city of Louisville that they would pay into the sinking fund of the city of Louisville the amount which would be due from them if the ordinance in question was held valid. Of the amount thus paid the difference between the amount of taxes due from the banks and trust companies of the city of Louisville to the State of Kentucky under the general rate of taxation for the year 1894 and the amount which would have been due the State of Kentucky from the said banks and trust companies under the 'Hewitt bill' was to be paid by said banks and trust companies into the sinking fund of the city of Louisville absolutely; the balance of the amount paid into the sinking fund under the ordinance was to be treated and considered as a loan from the banks and trust companies to the sinking fund, and as evidence of which the board of sinking fund commissioners executed and delivered to each of said banks and trust companies their respective promissory notes for the respective sums so loaned by the banks and trust companies to the sinking fund; that in pursuance of said arrangement, on the 7th day of March, 1894, the plaintiff, The German Security Bank, paid into the sinking fund the sum set up in the first paragraph of the petition herein, to wit, the sum of $1,821.62; of this amount the sum of $581.75, under the agreement hereinbefore set

forth, was to be paid absolutely, and for the balance, to wit, the sum of $1,239.87, the board of sinking fund commissioners executed and delivered to the plaintiff its promissory note. The defendants state that afterwards there was instituted and was pending in the
82 Jefferson circuit court, common pleas division, several actions by tax-payers, styled 'George W. Levi against The City of Louisville' and 'J. Duff Reed against City of Louisville,' wherein it was claimed that under and by virtue of the present constitution of the State of Kentucky there was bound to be a uniform rate of ad valorem taxation upon all property, whether real or personal, for city, county, and State purposes; that said last-named actions came on for trial before the judge of the common pleas division of the circuit court, who rendered an opinion and judgment therein, wherein it was adjudged that all property in the city of Louisville under the constitution must be taxed at a uniform ad valorem rate of taxation, and that any attempt on the part of the city of Louisville to substitute a license system of taxation in lieu of the ad valorem system was void. After this judgment was rendered, during the fiscal year of 1895, which said fiscal year began on the first day of September, 1894, the subject of what the city should do in regard to taxing the banks and trust companies of the city of Louisville again came up between the board of sinking fund commissioners and the counsel for the plaintiff and the other banks and trust companies. The counsel for said banks and trust companies were extremely anxious that the city of Louisville and the sinking fund commissioners should still continue the license system of taxation, and, above all things, feared and dreaded the ad valorem system of taxation as applied to the banks and trust companies, and the plaintiff and the other banks and trust companies of the city of Louisville entered into a new agreement and contract with the city of Louisville, by which it was then and there agreed that if the city of Louisville
83 should continue the license system as to the banks and trust companies of the city of Louisville in lieu of the ad valorem system of taxation until the Levi and Reed cases against the city and the cases of The Bank of Kentucky, The Louisville Banking Company, and The Third National Bank against R. H. Thompson, judge, and The City of Louisville should be all finally determined and ended in the court of appeals, where they were all then pending, that the plaintiff and the other banks and trust companies, except the three litigating banks, would all surrender the notes that they had received for the loan made under the first agreement heretofore set out, and would, pending the termination of said actions in the court of appeals, pay year by year the license required by the ordinance in question absolutely and without recourse; that in pursuance of said agreement and contract the plaintiff, The German Security Bank, voluntarily surrendered to these defendants the said note executed and delivered as aforesaid, and then and there agreed that the payment of $1,821 62 paid as aforesaid should be absolute and without recourse, and afterwards, to wit, February 11th, 1895, the said plaintiff paid into the sinking fund of the city of Louisville

voluntarily and under said contract the further sum of $1,466.64. Defendants state that at the various times of said agreement and contract and payments neither the plaintiff nor these defendants nor the city of Louisville knew certainly what the rights of the banks and trust companies and the city of Louisville and these defendants were, but, having the uncertainty of the law in view and for the mutual benefit of all parties concerned, and in the spirit of a fair and honorable compromise and adjustment of the questions in issue between them in so far as that was possible, the plain-
84 tiff and the other banks and trust companies of the city of Louisville and the city of Louisville and these defendants entered into the contract herein set forth, and all of the money paid by the plaintiff, as set forth in its petition, into the sinking fund of the city of Louisville was paid in pursuance of said contract and in execution thereof; that on their part the defendants and the city of Louisville faithfully carried out their part of said contract until all of the litigation heretofore mentioned as pending in the court of appeals had been settled, it having been determined by said court that the banks, among whom was the plaintiff, had an irrevocable contract under the 'Hewitt bill,' as set forth in the petition. Neither plaintiff nor any other bank or trust company in the city of Louisville has ever paid anything further in the way of taxes or license.

Defendants further state that during all the negotiation for the two contracts set forth in this answer between the banks and trust companies and the city of Louisville and these defendants the plaintiff and the other banks and trust companies of the city of Louisville were represented by Messrs. James P. Helm and A. P. Humphrey, who were their counsel, and who, at each and every stage of the proceeding, advised with the plaintiff and these defendants and the city of Louisville and agreed to and consented to every part of the said agreement and contract and advised the execution and carrying out of the same, and that all of the payments made by the plaintiff and the other banks and trust companies into the sinking fund of the city of Louisville, as aforesaid, were made under the immediate supervision and advice of said counsel, Messrs.
85 Helm and Humphrey; and defendants state that all of said payments were all made voluntarily by the plaintiff, as aforesaid, and without any sort of threat or force or demand on the part of these defendants or the city of Louisville."

H. S. BARKER.

The parties hereto, being present by attorney, waive all exceptions except as to competency and relevancy.

STATE OF KENTUCKY, }
County of Jefferson. }

I, J. P. Martine, examiner, do certify that the foregoing deposition of H. S. Barker was taken pursuant to agreement before me and was read to and subscribed by him in my presence at the time and place and in the action mentioned in the caption, the said wit-

ness having been first sworn by me that the evidence he should give in the action should be the truth, the whole truth, and nothing but the truth, and his statements reduced to writing by me in his presence.

Complainant and defendants, by attorney, being present.

Given under my hand this 7th day of July, 1897.

J. P. MARTINE, *Examiner.*

86 Exhibit of the foregoing deposition is as follows:

"EXHIBIT COPY."

SINKING FUND OFFICE, *Feb'y* 13, 1894.

A committee, consisting of Messrs. Thomas L. Barrett, John H. Leathers, and George W. Swearingen, appeared before the board on behalf of the banks who are members of the Louisville clearing-house and stated that it was the purpose of said banks to resist the payment of the license fee demanded of them under the license ordinance approved January 29, 1894, on the ground that said banks were not legally liable to pay the same, but, in order to save the sinking fund from any embarrassment occasioned by their refusal to pay said license fee, the banks, with two or three exceptions, were willing to enter into an arrangement whereby they would pay a part of the amount demanded of them and lend the sinking fund the balance thereof, to be repaid, with interest at four per centum per annum, if it was finally decided and adjudged that the banks were not liable to pay said license fees.

After discussion, the president was, on motion of Mr. Tyler, seconded by Mr. Summers, authorized to enter into the following arrangement with the different banks, trust, and title companies who will be subject to the payment of the license fees if the license ordinance is finally adjudged to be valid and enforceable:

First. To accept from each of said banks and companies a payment equal to the difference between the amount they now pay to the State for State taxes and the amount they would be required to pay for State taxes under the provisions of what is known as the "Hewitt bill." This sum shall be an actual payment,
87 not to be repaid under any circumstances, but its payment shall not in any manner or to any extent prejudice the banks or companies paying it or be taken as a waiver of any legal right which they have in the premises.

Second. In addition to making the above payments the said banks and companies, save those selected to test the question involved, shall each lend the sinking fund a sum which, added to said payment, will equal four per centum of its gross earnings during the year 1893, and the sinking fund will execute for said loans its obligations agreeing to repay the same, with interest at four per centum per annum, when and if it shall be finally adjudged by the court of last resort that said banks or companies are not liable to pay the license fee required by the ordinance aforesaid, but if it is finally adjudged that they are liable to pay said license fee, then the said

loan shall be taken and deemed as a payment of said license fee and the obligation to repay the same shall be void.

Third. The banks or companies selected to test the question involved will each lend the sinking fund a sum equal to four per centum of their gross earnings for the year 1893 and will receive therefor the obligations of the sinking fund as above described.

Fourth. This arrangement is to be entered into with the understanding that the said banks and companies will institute without delay and diligently prosecute such actions as may be necessary to settle and adjudge the right and liabilities of the parties in the premises, and pending such proceedings the sinking fund will not prosecute them or any of them for doing business without license.

A true copy.

Attest: J. M. TERRY,
Secretary & Treasurer.

88 Exhibit "A" of the foregoing deposition is as follows:

"EXHIBIT A."

Stipulation between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, and the banks, trust, and title companies of the city of Louisville.

It is agreed between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, represented by H. S. Barker, city attorney, acting under the advice and by the authority of the board of sinking fund commissioners, given at a regular meeting of said board, and the mayor of the city of Louisville, on the one part, and the various banks, trust and title companies of the city of Louisville, acting by Humphrey & Davie and Helm & Bruce, their attorneys, of the other part:

First. That in February, 1894, it was agreed between the city of Louisville and the board of sinking fund commissioners, acting together in the interest of the said city, and the various banks, trust and title companies, acting through their committee, to wit, Messrs. Thomas L. Barrett, John H. Leathers, and George W. Swearingen, and their counsel, to wit, Mess. Humphrey & Davie and Helm & Bruce, that the question of the liability of said banks and trust and title companies to pay municipal taxes, either license or ad valorem, otherwise than as provided by the revenue law, commonly known as the Hewitt bill, should be tested by appropriate litigation looking to that end.

Second. In order to effectually test the question as to all of said companies they were divided into three classes, it being understood that all who had accepted the provisions of the said Hewitt bill would fall in one or the other of the classes named to wit:

89 A. Banks whose charters had been granted prior to 1856.

B. Banks whose charters had been granted subsequent to 1856.

C. National banks.

It being understood that the trust and title companies which had

accepted the provisions of the Hewitt bill would fall in class B, above named.

Third. In pursuance of that agreement the sinking fund commissioners caused to be issued warrants against the Bank of Kentucky, representing class A, the Louisville Banking Company, representing class B, and the Third national bank, representing class C, and these banks respectively applied for writ of prohibition against the city court of Louisville proceeding with the hearing, that being the manner pointed out by the city charter for testing the validity of city ordinances.

It was distinctly understood and agreed at that time, and this agreement was made for the best interest of all parties to it, that if any bank in any class should eventually fail to establish the existence and validity of the contract which it was claimed was made under the Hewitt bill, that all of that class should thereafter regularly and promptly submit to the existing laws and pay their taxes; and it was also agreed that if any bank of any class should succeed in establishing a contract and the validity thereof under the Hewitt bill, that that should exempt all banks and companies falling within that class from the payment of taxes, except as provided in the Hewitt bill.

Fourth. On the faith of this agreement all of the banks and companies aforesaid paid into the sinking fund the amounts of taxes claimed against them, under the terms and conditions named in the minutes of the sinking fund commissioners of Febru-
90 ary 13th, 1894, an attested copy of which is hereto attached as part hereof, but at a later date and in further reliance upon said agreement all said banks and companies, except those actually involved in the test cases, paid the whole of the amount of taxes claimed as against them by the city of Louisville without reservation until the question thus raised should be finally disposed of.

HUMPHREY & DAVIE,
HELM & BRUCE,
For the Banks, Trust, & Title Companies of the City of Louisville.
H. S. BARKER, *City Att'y.*

Approved:
C. H. GIBSON,
Pres't Com. Sinking Fund City of Lou.

91 The deposition of J. M. Terry, taken before me on July 6, 1898, at the office of the commissioners of the sinking fund of the city of Louisville in the city hall, Louisville, Kentucky, to be read as evidence on behalf of the defendant City of Louisville in an action pending in the United States circuit court for the sixth circuit, district of Kentucky, in which The Bank of Commerce is complainant and S. H. Stone and others are defendants, No. 6567, taken by agreement of parties thereto.

The witness, having been by me first cautioned and sworn to testify the truth, the whole truth, and nothing but the truth in the

matter of controversy herein, did thereupon depose, testify, and says as follows, viz:

Examined in chief by H. L. STONE, city attorney and counsel for defendant City of Louisville:

Q. State your age, residence, and occupation.

A. Fifty-four years old; Louisville, Ky.; # 2125 Third street; I am treasurer and secretary of the sinking fund.

Q. How long have you held your present official position?

A. Since the first day of August, 1875.

Q. Are you the custodian of the records and proceedings of the commissioners of the sinking fund of the city of Louisville?

A. Yes, sir.

Q. I will ask you to state what appears on the journal or record of the proceedings of the members or commissioners of the sinking fund of the city of Louisville, if anything, with respect to the license tax imposed by the ordinance of January 29, 1894, and the banks and trust companies in this city.

92 A. On February 13, 1894, I find a resolution adopted by the commissioners in regard to the license to be paid by the banks and trust and title companies.

Q. There is already in this record a copy of this resolution referred to of February 13, 1894. I will now ask you if you find any resolution or proceedings taken by the commissioners of the sinking fund with respect to the same subject at any subsequent date; if so, give the date, and file a certified copy of the order or minute which you find on the journal of the board.

A. There is no other resolution, so far as I know, that is on the journal regarding the subject.

Q. Is there any other order or minute on the journal of said commissioners having any connection with that subject in any way? If so, state when it was entered, and furnish a copy of the same.

A. At present I have no recollection of any other record, except the one of February 13, 1894. I will examine the books, and if there is any I will furnish a certified copy of it.

(Witness examines his books.)

Q. Do you find any action taken by the said commissioners, as shown by the journal, with respect to any note or notes given by the commissioners to any of the banks or trust companies for portions of the amounts paid by them under the resolution of February 13, 1894? If so, state what you find on that subject or furnish a copy of the entry.

A. I find nothing except the original resolution of February 13, 1894. (After examining the book further witness continues:) I find an entry on February 12, 1895, of which I herewith file a

93 copy certified by me as secretary and make it a part of my deposition, marked Exhibit "J. M. T. # 2." I also find an entry on April 9, 1895, of which I file a certified copy, marked Exhibit "J. M. T. # 3."

Q. Do you find any other minute or entry upon the journal of said commissioners pertaining to the banks and trust companies for the license taxes against them in the ordinance of January 29, 1894?

A. Well, on December 12, 1895, I find an entry, a copy of which, certified by me as secretary, is filed with this deposition, marked Exhibit "J. M. T. # 4."

By Mr. HELM: Those notes were paid finally?

A. Well, here on January 24, 1896, at a called meeting, I find an entry, a certified copy of which is filed herewith, marked Exhibit "J. M. T. # 5."

Q. Do you find any other entries on the journal of the commissioners pertaining to this subject?

A. None that I call to mind now, sir.

Q. Well, you find none?

A. (Witness, after looking further:) No, sir; I do not, except on March 10, 1896, marked "J. M. T. # 5½," filed herewith.

Q. I will ask you if you have made off a statement showing the institutions which paid licenses under the ordinance of January 29, 1894, to the sinking fund commissioners for the year 1894 and showing the dates and amounts of such payments.

A. Yes, sir.

Q. Will you file that and make it a part of your deposition?

A. Yes, sir; marked Exhibit "J. M. T. # 6."

94 Q. I notice a considerable number of these payments are under date of December 31, 1894. Will you please explain that?

A. That is explained by the fact that the banks on that date surrendered to the commissioners the notes of the commissioners which they held for the stated amounts.

Q. I will ask you to state if you have made a similar statement showing the amounts paid under the license ordinance by the different banks and other institutions for the year 1895?

A. Yes, sir.

Q. Does or not that statement also show the amounts of notes executed by the commissioners to the Louisville Banking Company, Bank of Kentucky, and Third national bank which the commissioners paid back to said institutions?

A. It shows it on that statement, but the notes that were executed to the Bank of Kentucky and the Louisville Banking Company and the Third national bank were executed in 1894 and were not paid until 1896. That statement will show the dates that the notes were paid; also the amounts and interest.

Q. Will you file the last-named statement for the year 1895, as well as the statement concerning the notes executed and paid by the commissioners?

A. Yes, sir; and mark it Exhibit "J. M. T. # 7."

Q. I now invite your attention to a document which purports to be a stipulation between the city of Louisville, the commissioners of the sinking fund of the city of Louisville, and the banks, trust and title companies of the city of Louisville, which is without date and appears to have been signed by Humphrey & Davie, Helm &

Bruce, for the banks, trust and title companies of the city of Louisville—H. S. Barker, city attorney—and approved by C. H.
95 Gibson, president of the commissioners of the sinking fund of the city of Louisville, and made an exhibit with the deposition of H. S. Barker in this case, and ask you whether you ever saw or know anything about that document in any way.

A. No, sir; I never saw it.

Q. Was that document ever presented at any meeting of the board of commissioners and approved or ratified by it?

A. Not to my knowledge.

Q. Is there any minute on the journal of the board of sinking fund commissioners as to that document?

A. No, sir.

Q. Did you ever have it in your custody or control or keep a duplicate of it?

A. No, sir.

Cross-examined by Hon. A. P. HUMPHREY, attorney for the complainants:

Q. Mr. Terry, I will get you to read to the commissioner a copy of the note executed by the commissioners of the sinking fund to the Bank of Kentucky.

A. In the upper left-hand corner, "No. 19."

$8,063.48. LOUISVILLE, KY., *M'ch* 13, 1894.

"The commissioners of the sinking fund of the city of Louisville acknowledge themselves indebted to the Bank of Kentucky, of Louisville, Kentucky, in the sum of eight thousand & sixty-three $\frac{48}{100}$ dollars, this day loaned to them, and agree to repay said sum, with interest thereon at the rate of four per centum per annum, when and if it shall be finally adjudged by the court of last resort that the said payee is not liable to pay to the city of Louis-
96 ville or said sinking fund commissioners a license fee for the year 1894, equal to four per centum of its gross earnings in the year 1893, and if it shall be finally adjudged that the said payee is liable to pay said license fee, then the sum above named shall be taken and deemed as paid on account of said license fee, as of this date, and this obligation shall be of no effect.

CHAS. H. GIBSON, *President.*
[SEAL.] J. M. TERRY, *Sec'ty & Tr.*"

Q. The notes that were given to the other banks were of similar import, were they not?

A. That is my impression.

Q. They have been destroyed?

A. They have been destroyed.

Q. But it is your impression that they were all written in the same form?

A. That is my impression—that they were all written in the same—wording was exactly the same.

Q. Now, is it not a fact that instead of a note being given to the

Bank of Louisville it paid 32½ cents on each share of its capital stock, which was more than four per cent. on its gross earnings?

A. I could not say whether it equalled more than four per cent. on its gross earnings. I know that the bank sent down here on February 20, 1894, and paid the license. That was the first license that was paid.

Q. Well, that was paid when?

A. February 20, I think, 1894.

97 Q. Now, you do not recollect what its gross earnings were returned?

A. No; I do not.

Q. Is there any memorandum in the office that will show that?

A. I think there is. I think their affidavit is here on file.

By Mr. HELM: Get that if you can.

A. I don't know whether I can or not. I can look for it. I cannot say whether I have it. We cleaned out here some time ago and may have sent them up to the archives. Maybe I can find it. I will not be certain.

Q. When you were taking those notes from the various banks you had from each of them a statement of their gross earnings for the year 1893; that is a fact, is it not?

A. Yes, sir.

Q. It is a fact, is not it, that under this resolution of the sinking fund commissioners of February 13, 1894, the three banks—Bank of Kentucky, Third national bank, and the Louisville Banking Company—gave to the commissioners of the sinking fund four per cent. upon their gross earnings, and the commissioners of the sinking fund executed to each of those banks a note for that amount in the form that you have just now read? That was true in regard to these three banks?

Q. No. It was true in regard to the Bank of Kentucky.

Q. I say in regard to these three banks.

A. No. It is true in regard to the Bank of Kentucky and to the Louisville Banking Company. As to the Third national

98 bank, you will remember that the First national bank was the bank selected by you all in the suit to litigate the question, but it had not accepted the provisions of the Hewitt bill.

Q. Well, what note did you execute to the Third national bank?

A. We executed to the Third national bank a note for $1,493.91. They paid us $1,300.

Q. And you executed them a note for how much?

A. And we executed a note for $1,493.91.

Q. And the note that you gave was of this same form?

A. Yes, sir, and my recollection is that all the notes were of the same form.

Q. Now, in regard to the other banks, as I understand it, what they did was this: the computation was made as to what would be four per cent. upon their gross earnings for the year 1893; they paid that sum into the sinking fund; the sinking fund gave a note to each of those banks for the whole of that amount, less 32½ cents upon each share of the capital stock of each bank?

A. Yes, sir.

Q. And you say you do not now recollect whether the failure to give the Bank of Louisville a note came from the fact that when you deducted this 32½ cents on each share of the capital stock from the amount paid it left nothing; is not that a fact?

A. The best of my recollection is that the bank sent a statement down here and the figures were so close and the difference was so little either way that they concluded to pay the license and not take any note. The difference, I think, was a little bit in their favor.

99 That is my recollection. I do not know whether I have that statement or not. I file affidavit of said bank herewith and mark it "Exhibit J. M. T. # 1."

Re-examined by Col. H. L. STONE:

Q. No notes were given by the commissioners of the sinking fund for any amounts paid for the license tax for the year 1895?

A. No, sir; the money was all paid in absolutely and without any protest at all, as I understood it.

Q. I see under the head of German Security bank, in the statement for 1895, that two amounts are given. Will you please explain what that is?

A. Well, this first amount is for the license.

Q. The second amount is for what?

A. $1,237.87 represents a note that was given by the commissioners of the sinking fund to the German Security bank.

Q. In 1894?

A. In 1894—March 7, 1894—and they did not surrender it until February, 1895.

Q. Then, if I understand you, the German national bank did not surrender its note until 1895, that was given in 1894?

A. Yes, sir.

Q. When those license taxes were paid for the years 1894 and 1895 by those banks and institutions, was a license issued by you as secretary of the commissioners of the sinking fund?

A. Yes, sir; a license was issued to each one of them.

Q. In both years?

A. Yes, sir.

Recross-examined by Judge HUMPHREY:

Q. In the year 1895, neither the Bank of Kentucky nor

100 the Bank of Louisville paid anything at all. That is a fact, is not it?

A. I think that statement shows that the Bank of Kentucky and the Bank of Louisville paid nothing at all.

And further sayeth not.

J. M. TERRY.

UNITED STATES OF AMERICA,
State of Kentucky, County of Jefferson, } ss:

I, John F. Groene, a notary public in and for the State and county aforesaid, hereby certify that the foregoing deposition of J. M. Terry

was taken before me at the time and place and for the purpose stated in the caption; that the witness, being of sound mind and of lawful age, was first cautioned and sworn to testify the whole truth; that said deposition was taken by — in shorthand by agreement, and then carefully transcribed in writing on the typewriter, after which the same was read over by the witness and subscribed in my presence; and I do further certify that I am not of counsel nor attorney for either of the parties in the said deposition and caption named, nor in any was interested in the event of the cause named in the said caption. There were present during the taking of said deposition H. L. Stone, city attorney, and James P. Helm and A. P. Humphrey, attorneys for complainant.

Given under my hand and official seal this July 8, 1898.

My commission expires January 23, 1900.

JNO. F. GROENE,

[SEAL.] *Notary Public, Jefferson Co., Ky.*

101 Exhibit J. M. T. #1 with the deposition of J. M. Terry is as follows:

Bank and trust companies.

STATE OF KENTUCKY, } *sct:*
Jefferson County, }

E. A. Hewett, being duly sworn, says that he is the cashier of the Bank of Louisville, doing business in the city of Louisville, Kentucky, and that the gross earnings of said bank during the year from the 1st day of February, 1893, to the 1st day of February, 1894, amounted to the sum of $50,906.54, exclusive of rent from real estate paying taxes to the city of Louisville.

This affidavit is made for the purpose of obtaining license to do business in said city for one year from the 1st day of February, 1894.

E. A. HEWETT, *Cashier.*

Subscribed and sworn to before me *by* this 20th day of Feb'y, 1894.

JAS. A. KERRY,
Notary Public, Jefferson County, Ky.

A copy.
Attest: J. M. TERRY,
Sec'l'y & Treas.

102 Exhibit "J. M. T. #2" with the deposition of J. M. Terry is as follows:

(Copy.)

Office- commissioners of the sinking fund, rooms 27 & 28, city hall.

LOUISVILLE, KY., *February* 12, 1895.

At a regular meeting of the commissioners of the sinking fund held at office Tuesday afternoon, Feb'y 12, 1895, at 4 o'clock, the

following members were present: Charles H. Gibson, president; Mr. Henry Glover, and Hon. Charles F. Grainger, president of the board of aldermen.

The treasurer presented to the commissioners notes of the commissioners executed to various banks under an arrangement entered into Feb'y 13, 1894, which were voluntarily surrendered, and were ordered to be destroyed by fire. The following is a list of notes surrendered, date of execution, and amount:

German bank,	March 7, 1894....	$5,547.28
German Insurance bank,	"	5,478.58
Bank of Commerce,	"	3,972.81
First national bank,	"	3,868.95
Western bank,	"	2,024.37
German Security bank,	"	1,239.87
Kentucky national bank,	"	1,019.28
Second national bank,	"	987.86
Farmers' & Drovers' bank,	"	662.13
Louisville City nat. bank,	"	635.26
Fidelity Trust and Safety Vault Co.,	March 8, 1894....	2,881.58
The Louisville Trust Co.,	"	1,922.74
The Kentucky Trust Co.,	"	171.35
103		
Columbia Finance and Trust Co.,	March 10, 1894....	1,870.16
Union national bank,	March 10, 1894....	2,320.27
Germania Safety Vault and Trust Co.,	"	898.33
Citizens' national bank,	March 13, 1894....	2,817.20
Merchants' national bank,	March 24, 1894....	1,161.21

On motion of Mr. Glover, seconded by Mr. Grainger, the secretary was directed to furnish each of the assistant license inspectors with a copy of resolution adopted January 8, 1895, regulating the compensation of assistant license inspectors.

The following bills were allowed and ordered paid:

Bradley & Gilbert Co.....	$256.30
Bennett Bros.' Co....	3.20

When, on motion, the board adjourned.

CHAS. H. GIBSON, *P't.*

J. M. TERRY, *Sect. & Tr.*

A copy.
Attest: J. M. TERRY,
Sec't'y & Treasurer.

Exhibit "J. M. T. # 3" with the deposition of J. M. Terry is as follows:

(Copy.)

Officers commissioners of the sinking fund, rooms 27 & 28, city hall.

LOUISVILLE, KY., *April* 9, 1895.

At a regular meeting of the commissioners of the sinking fund held at office Tuesday afternoon, April 9, 1895, at 4 o'clock, the following members were present: Chas. H. Gibson, president; W. R. Ray, Henry Glover, and Hon. Henry S. Tyler, mayor.

104 The treasurer presented to the commissioners note of the commissioners, dated March 13, 1894, for one hundred and eighty-one $\frac{55}{100}$ dollars, executed to the German national bank under an agreement entered into Feb'y 13, 1894. Said note was voluntarily surrendered and was ordered destroyed by fire.

* * * * * * *

When, on motion, the board adjourned.

CHAS. H. GIBSON, *P't.*

J. M. TERRY,
Sec't'y & Tr.

A copy.
Attest: J. M. TERRY,
Sec't'y & Treasurer.

Exhibit J. M. T. # 4 with the deposition of J. M. Terry is as follows:

Officers commissioners of the sinking fund, rooms 27 & 28, city hall.

LOUISVILLE, KY., *December* 12, 1895.

At an adjourned meeting of the commissioners of the sinking fund held at office Tuesday afternoon, December 12, 1895, at 3 o'clock, the following members were present: Chas. H. Gibson, president; W. R. Ray, Wm. F. Mayer, Hon. Henry S. Tyler, mayor, and Hon. R. E. King, president of the board of aldermen.

* * * * * * *

The secretary submitted to the board a letter received by him from the German Security bank demanding a return to it of the amount heretofore paid by it for license taxes for the years 1894–'95. The board having considered the matter, the president was instructed to notify said German Security bank that the board refused to refund any part of the amount so paid by it.

105 The president thereupon called the attention of the board to the demand made upon him by the Louisville Banking Company and Third national bank to pay the notes now held by those institutions, which were given by the sinking fund commissioners in adjustment of their license taxes for the year 1894 pending litigation. The board, after fully considering the matter, directed

the president to inform said Louisville Banking Company and Third national bank that it would not pay the said notes.

* * * * * * *

When, on motion, the board adjourned.

CHAS. H. GIBSON, *P't.*

J. M. TERRY,
Sec't'y & Tr.

A copy.
Attest: J. M. TERRY,
Sec't'y & Treasurer.

Exhibit J. M. T. #5 of the deposition of J. M. Terry is as follows:

Office- of commissioners of the sinking fund, rooms 27 & 28, city hall.

LOUISVILLE, KY., *January* 24, 1896.

At a called meeting of the commissioners held at their office in the city hall on January 24, 1896, there were present Charles H. Gibson, president; R. E. King, mayor *pro tem.;* William F. Mayer, Esq., and H. S. Barker, Esq., city attorney.

The president explained that he had called the board together to consider several matters that had been presented to him for decision and on which he desired the action of the board.

* * * * * * *

The president next informed the board that the Bank of
106 Kentucky, Louisville Banking Company, and Third national bank were threatening to institute suits on the notes held by them which were executed in pursuance to the authority given at the meeting of the board held on the 13th day of February, 1894, and he desired the board to reconsider the matter and decide whether it would adhere to the decision formerly made on the 12th day of December, 1895, to resist the payment of the notes referred to.

The president explained that unless there had been some arrangement between the city attorney and the banks named, whereby they were to surrender their notes, as the other banks did, he could see no possible ground to avoid payment of them, and that he had, therefore, requested the city attorney to be present, in order that the board might act with a full understanding of the facts.

The city attorney, Mr. Barker, being present, explained the circumstances under which the banks, other than the three above named, had agreed to surrender their notes, and stated that there was no agreement or understanding of any character which affected the liability of the sinking fund on the notes held by those three banks. He further advised the board (and the president concurred with him) that even if the court of appeals should hereafter overrule its opinion and decision rendered in the bank-tax cases, to which the three banks referred to were parties, it would not relieve the sinking fund from liability to pay the notes held by them, be-

cause there had been a final adjudication to the effect that those banks were not subject to license tax for the year 1894, and that adjudication would not be affected by any subsequent decision of the court of appeals on the same question.

After further discussion and consideration, on motion of Mr. King, seconded by Mr. Mayer, the president was, by a unanimous vote, directed to inform the three banks referred to
107 that the commissioners of the sinking fund recognize the notes held by them as valid obligations, which will be paid, and to ask that they will, in view of the present condition of the finances of the sinking fund, indulge the board until it is able to accumulate funds out of which they can be paid.

The president next called attention to a written demand from the Bank of Louisville for the repayment of the sum paid by it for bank license for the year 1894, and asked the city attorney for his opinion as to the liability of the sinking fund in the premises. The city attorney and the president concurred in the opinion that the Bank of Louisville was entitled to recover the amount paid by it, unless the court of appeals, in the cases now pending or which will soon be pending before it, shall overrule the decision heretofore made by it. In view of the uncertainty of the action of the court of appeals he advised that the Bank of Louisville be notified that if the court adheres to its opinion the sinking fund will repay the amount paid for license, with interest at five per cent. per annum from the date of the demand for repayment (January 24, 1896), and ask to have the matter left in abeyance until the court has again passed on the question.

On motion of Mr. King, seconded by Mr. Mayer, the president was, by a unanimous vote, directed to act in accordance with the advice so given by the city attorney.

On motion, the board adjourned.

CHAS. H. GIBSON, *P't.*

J. M. TERRY,
Sec't'y & Tr.

A copy.
Attest: J. M. TERRY,
Secretary & Treasurer.

108 Exhibit "J. M. T. # 5½" with the deposition of J. M. Terry is as follows:

Office- commissioners of the sinking fund, rooms 27 & 28, city hall.

LOUISVILLE, KY., *March* 10, 1896.

At a regular meeting of the commissioners of the sinking fund held at office Tuesday morning, March 10, 1896, at 10 o'clock, the following members were present: Chas. H. Gibson, president; W. R. Ray, Wm. F. Mayer, Hon. R. E. King, president of board of aldermen, and Hon. Geo. D. Todd, mayor.

* * * * * * *

The president reported that in accordance with a resolution adopted January 24, 1896, he directed, on February 21, the secretary

and treasurer to pay the notes of the commissioners executed by them to the Louisville Banking Company Feb'y 26, 1894, for $5,938.78; the Third national bank, March 8, 1894, for $1,493.91; March 13, 1894, to the Bank of Kentucky, for $8,063.48, and interest at four per cent. from date of execution to Feb'y 21, 1896; that the secretary and treasurer had paid said notes, with interest, as directed, when, on motion, the action of the president and secretary and treasurer was approved.

* * * * * * *

When, on motion, the board adjourned.

CHAS. H. GIBSON, *Pres't.*

J. M. TERRY,
Sec'y & Tr.

A copy.
Attest: J. M. TERRY,
Secretary & Treasurer.

Exhibit J. M. T. # 6 of J. M. Terry's deposition is as follows:

109 *Amount Paid by Banks and Trust Companies During Year* 1895 *into the Sinking Fund.*

1895.				
Jan'y	25.	Banks: German-American Title Co., license ...	121 60	
Feb'y	4.	The Dime savings bank, " ...	36 34	
	4.	Union national bank, " ...	4,689 32	
	6.	Third national bank, " ...	2,620 27	
	7.	Farmers' & Drovers' bank, " ...	1,614 50	
	8.	Fidelity Trust and Safety Vault Co., license	6,849 76	
	8.	First national bank, license.....	4,147 51	
	8.	Louisville Banking Co., license.....	4,223 62	
	11.	German Security bank, "	1,466 64	
	11.	" " " "	1,239 87	
	11.	Kentucky Title Co., "	346 07	
	13.	German Insurance bank, "	5,661 40	
	19.	German bank, "	6,021 40	
	25.	Germania Safety Vault & Trust Co., license.....	1,122 33	
	26.	Western bank, license	2,365 20	
	27.	Citizens' national bank, license	4,700 81	
	14.	Bank of Commerce, "	7,263 00	
March	13.	Kentucky Title Co., "	243 20	
	29.	Columbia Finance & Trust Co., license..	5,415 58	
	29.	Louisville Trust Co., " ..	4,751 63	
April	3.	Louisville City national bank, " ..	1,306 89	
	7.	German national bank, " ..	181 55	
	7.	" " " " ..	1,222 17	
	15.	American national bank, " ..	3,993 45	
				71,604 11
1894.				
		Bills payable, notes of commissioners, and being four per cent. of gross earnings from Feb'y 1, 1893, to Jan'y 31, 1894, per agreement of Feb'y 13, 1894:		
Feb'y	26.	Note No. 1, Louisville Banking Co.....	5,938 78	
M'ch	13.	" No. 19 to Bank of Kentucky.....	8,063 48	
		" No. 14 to Third national bank	1,493 91	
				15,496 17

1896.				
Feb. 21.	Bills payable:	Paid note No. 1 of commissioners to Louisville Banking Co., dated Feb'y 26, 1894	5,938 78	
110		Paid note No. 19 of commissioners to Bank of Kentucky, dated M'ch 13, 1894	8,063 48	
		Paid note No. 14 of commissioners to Third national bank, dated March 8, 1894	1,493 91	
				15,496 17
Feb'y 21.	Interest:	On note No. 1 to Louisville Banking Co. from Feb'y 26, 1894, to Feb'y 21, 1896	475 12	
		On note No. 19 to Bank of Kentucky from March 13, 1894, to Feb'y 21, 1896	625 33	
		On note No 14 to Third national bank from March 8, 1894, to Feb'y 21, 1896	117 86	

Amount Paid by Banks and Trust Companies During the Year 1894 *into the Sinking Fund.*

1894.				
Feb'y 20.	Bank of Louisville			2,036 26
March 1.	Kentucky Title Company			195 58
7.	German Security bank			581 75
7.	Bank of Commerce		2,600 00	
Dec. 31.	" "		3,972 81	
				6,572 81
March 7.	Kentucky national bank		1,625 00	
Dec. 31.	" " "		1,019 28	
				2,644 28
March 7.	Second national bank		975 00	
Dec. 31.	" " "		987 86	
				1,962 86
March 7.	Louisville City national bank		1,300 00	
Dec. 31.	" " " "		635 26	
				1,935 26
March 7.	German bank		975 00	
Dec. 31.	" "		5,547 28	
				6,522 28
March 7.	Farmers' & Drovers' bank		980 52	
Dec. 31.	" " "		662 13	
				1,642 65
March 7.	Western bank		812 50	
Dec. 31.	" "		2,024 37	
				2,836 87
March 7.	German Insurance bank		810 88	
Dec. 31.	" " "		5,478 58	
				6,289 46
March 8.	Fidelity Trust & Safety Vault Company		3,250 00	
Dec. 31.	" " " " "		2,881 58	
				6,131 58
March 8.	The Louisville Trust Company		2,600 00	
Dec. 32.	" " " "		1,922 74	
				4,522 74
March 8.	Third national bank			1,300 00
8.	Kentucky Trust Company		471 20	
Dec. 31.	" " "		171 35	
				642 55
March 10.	Columbia Trust Company		3,250 00	
Dec. 31.	" " "		1,870 16	
				5,120 16
March 10.	Union national bank		2,437 50	
Dec. 31.	" " "		2,320 27	
				4,757 77

111

March 10.	Germania Safety Vault and Trust Company	650 00		
Dec. 31	" " " " " "	898 33		
			1,548 33	
March 13.	German national bank			817 37
" 13.	Citizens' national bank	1,625 00		
Dec. 31.	" " "	2,817 20		
			4,442 20	
March 24.	Merchants' national bank	1,625 00		
Dec. 31.	" " "	1,161 21		
			2,786 21	
May 28.	The Dime savings bank			33 25
Dec. 31.	First national bank			3,868 95
				69,191 17

112 The deposition of John H. Leathers, taken on the 8th day of July, 1898, at the office of Helm & Bruce, Louisville Trust bldg., at Louisville, county of Jefferson and State of Kentucky, to be read as evidence on behalf of the plaintiff in an action between The Bank of Commerce, plaintiff, and S. H. Stone, &c., defendants, now pending in the United States circuit court for sixth circuit & dist. of Kentucky.

Appearances:

For plaintiff: J. P. Helm, Esq.
For defendants: Col. Stone.

JOHN H. LEATHERS, being duly sworn and examined by Judge Humphrey as attorney for the plaintiff, deposed as follows:

1 Q. Will you please state what is your present occupation and how long it has been such?

A. I am cashier of the Louisville Banking Company and have occupied that position for the last twelve years.

2 Q. The Louisville Banking Co. is a member of the Louisville Clearing-house Association, is it not?

A. Yes, sir.

3 Q. I hand you a copy of the minutes of the Louisville Clearing-house Association held at the clearing-house on the 30th day of October, 1893. I will get you to look at those minutes and state whether they represent correctly the action taken at that meeting.

Counsel for defendant The City of Louisville objects to the competency and relevancy of the testimony, and, without waiving the objection to the testimony, does not require the custodian of the record to be introduced.

113 A. I was present at that meeting, and the action taken by the meeting, as set forth in the paper I hold in my hand, is correct.

4 Q. Wil- you file that paper and make it a part of your deposition?

A. I do so, marked Exhibit J. H. L. No. 1.

5 Q. Will you please look at what purports to be a copy of the minutes of the Louisville Clearing-house Association held at the

clearing-house on the 2nd day of February, 1894, and state whether or not you were present and whether that paper correctly represents what occurred at that time; and, if so, will you please file it and make it a part of your deposition, marked Exhibit J. H. L. No. 2?

Counsel for the defendant The City of Louisville makes the same objection to this question for relevancy and competency as made to the previous question.

A. I was present. I assume that the date given is correct, but I cannot recall the dates from memory of these meetings. I also remember the proceedings held on that day. That paper represents the proceedings of that meeting—what took place at that meeting. I file the paper as part of my deposition, marked as requested.

6 Q. I will ask you to look at a similar paper, purporting to give a record of what occurred at a meeting of the clearing-house on the 12th of February, 1894, and ask if you were present and whether that paper correctly represents what occurred at that meeting.

Objected to by counsel for defendant The City of Louisville as incompetent and irrelevant.

111 A. I remember this meeting very distinctly, and what that paper sets forth is what took place.

7 Q. Will you file that, please, and make it a part of your deposition, marked J. H. L. No. 3?

A. I do so.

8 Q. I will ask you if you were present at a meeting of the commissioners of the sinking fund of the city of Louisville held February 13th, 1894, and in connection with this question I show you a certified copy of the minutes of that meeting, which is filed with the deposition of Judge Barker in this case. Were you so present?

A. I was present with the committee and accompanied by our attorneys.

9 Q. Please state whether or not the committee composed of yourself and Messrs. Barret and Swearingen assented to the arrangement as therein set up.

A. We did, unanimously.

10 Q. Now, I will ask you to look at a paper which I now show you, purporting to be the proceedings of a meeting of the clearing-house held on the 14th of February, 1894, and I will get you to state whether you were present at that meeting and whether that paper correctly represents what occurred; and, if it does, please file it and make it a part of your deposition, marked Exhibit J. H. L. No. 4.

Objected to by counsel for defendant The City of Louisville as incompetent and irrelevant.

A. This meeting of the clearing-house held on the day following the meeting with the sinking fund commissioners was called
115 in order that the committee might make a report of the agreement that had been entered into with the city. I was

present at that meeting. This paper recites exactly what occurred. I file it as part of my deposition, marked as requested.

11 Q. I will ask you now to look at what purports to be a copy of the proceedings of the clearing-house at a meeting held on the 17th day of December, 1894, and ask you whether you were present and whether that correctly represents what occured at that time.

Objected to by counsel for defendant The City of Louisville as incompetent and irrelevant.

A. Yes, sir; I was present at this meeting and made the report for the committee, and this paper correctly recites what took place. I file it as part of my deposition, marked Exhibit J. H. L. No. 5.

12 Q. Will you please state what the Louisville Clearing-house Association is?

A. The Louisville Clearing-house Association is an association composed of all the banks of the city of Louisville, or, in other words, the associated banks of the city of Louisville.

13 Q. Are the trust companies members, and what about the trust companies; are they or have they at any time been members?

Objected to by counsel for defendant The City of Louisville.

A. The trust companies are not members of the Louisville Clearing-house Association, as they do not take checks to clear, but in all this matter of taxation they were invited to co-operate with us, and did.

14 Q. Please state the names of the four trust companies
116 represented by Mr. John Stites.

A. The Fidelity Trust & Safety Vault Co., the Louisville Trust Co., the Columbia Finance & Trust Co., and the Germania Safety Vault & Trust Co.

15 Q. Now, what, if any, of the banks did not go into this arrangement?

A. None of them that I recall.

16 Q. What, if any, failed to go in?

A. None of them failed to go in that I can recall except the Fourth national.

17 Q. How were the expenses of this litigation, including counsel fees, paid?

A. The counsel fees were paid by the banks, and including in this matter the trust companies, as we usually apportion such charges—that is, based upon the capital, surplus, and deposits of the banks, arriving at what the per cent. is, and then dividing the amount between them on that basis.

18 Q. Now, I have called your attention to a meeting of the sinking fund commissioners, at which the committee was present, on the 13th of February, 1894. I have also called your attention to the proceedings of the meeting of the clearing-house held on the next day, February 14th, 1894, at which the committee made a report. Now, I will ask you to state whether or not the banks and trust companies represented by your committee carried out this arrangement that the committee had made with the sinking fund commis-

sion by paying them certain sums and taking notes for certain parts of such sums.

A. They did so immediately.

117 19 Q. The Louisville Banking Co., I believe, took a note for the whole of the amount paid by it, as did the Bank of Kentucky at that time. That is a fact, is it not?

A. We took a note from the sinking fund for the amount we paid them?

20 Q. Yes.

A. We did.

21 Q. Do you recollect the three banks that were selected to bring suit?

A. I do.

22 Q. What were they?

A. The Bank of Kentucky, the Third national bank, and the Louisville Banking Co.

23 Q. Will you please state what counsel were employed by the committee to conduct this litigation?

A. The firms of Humphrey & Davie and Helm & Bruce.

24 (Q.) Will you please state what authority was given by your committee to these lawyers in regard to the conduct of this litigation?

A. The clearing-house authorized the committee to select the attorneys, which they did, and the attorneys selected were afterwards approved by the clearing-house, but the committee itself had full power to act.

25 Q. I hand you an agreement purporting to be made between the counsel for the banks and trust companies on the one side and H. S. Barker, city attorney, on the other side, approved by C. H. Gibson, president of the sinking fund commission of the city of Louisville, being the original contract filed with the deposi-

118 tion of Judge Barker. I will get you to read that contract and state whether the counsel, Messrs. Humphrey & Davie and Helm & Bruce, had authority from your committee to enter into that contract.

Objected to by counsel for defendant The City of Louisville as incompetent and irrelevant.

A. Yes, sir; the attorneys for the banks and trust companies, Messrs. Humphrey & Davie and Helm & Bruce, had full authority to act for the banks in making this contract with the sinking fund, and were instructed by the committee to do so.

26 Q. I will get you to state what was the position of the banks making the test cases and the banks not making the test cases, in regard to the result of the litigation?

Objected to by counsel for defendant The City of Louisville as incompetent and irrelevant.

A. Well, we were all to share exactly alike. We had to have three banks of certain classes to make the test cases, by instructions of our attorneys, and it was, in reality, no easy thing to get any of the banks

to agree to become the ones selected for that purpose, but the Bank of Kentucky and the Third national bank and the Louisville Banking Co. finally agreed that their names should be used in this litigation, as representing all the banks of their respective classes in the clearing-house.

Cross-examination by Col. STONE:

Q. You have been shown what purports to be a stipulation signed by counsel for the banks and trust companies, City Attorney Barker, and approved by C. H Gibson, president of the commissioners of the sinking fund. I will get you to state when you first saw that original document.

119 A. I first saw that original document today, but I was a member of the clearing-house committee on taxation; was present at the meeting; was present at the clearing-house meeting that approved the action of the attorneys, and am familiar in a general way with all this litigation.

Q. What has your presence at any meeting of the clearing-house members to do with this document that I have asked you about?

A. In behalf of the clearing-house, the associated banks of Louisville, and being a member of the committee on taxation appointed by said clearing-house, I was present at the sinking fund office when that agreement was entered into.

Q. You are now referring to the resolution of February 13th, 1894, are you not?

A. I am referring to the meeting that took place and the agreement on the part of our committee and attorneys with the sinking fund commission.

Q. That was February 13th, 1894, was it not?

A. Whatever the date may be.

Q. You are recited there as one of the committee that was present?

A. Yes, sir; and was present.

Q. How long after that was this stipulation referred to executed, or do you know?

A. I don't know.

Q. You for the first time saw it today?

A. Yes, sir.

Q. Was that original document ever filed or referred to in

120 the clearing-house?

A. Yes, sir.

Q. When?

A. In the report referred to here today. The committee made report.

Q. Which one? Just point out the one now that refers to that document.

A. The paper I refer to was the meeting of the clearing-house held on the 14th day of February, one day after the meeting held with the sinking fund commissioners, in which the committee on taxation makes report to the clearing-house of what was done at

the meeting held with the sinking fund commissioners, which is practically what is contained in that agreement.

Q. Do you mean the resolution of the day before—those first two pages? Do you mean that was practically the same as embraced in that?

A. In speaking of any agreements, I had no reference to any resolution of the sinking fund mentioned either at that time or thereafter. I am speaking of the agreement that was entered into by and between the attorneys and committee for the banks and the city of Louisville, and the meeting of the clearing-house association held on the 14th recites in this paper what the committee and sinking fund commissioners had agreed to.

Q. Not knowing when this document that is signed by the attorneys and which has been exhibited to you today for the first time was executed, you don't pretend to say that that particular document was ever presented in the clearing-house or filed as part of its proceedings in any way?

121 A. I could not say that that paper was, but the agreement and contract entered into by the committee and attorneys with the sinking fund was reported to the clearing-house.

Q. You mean the contract between the committee of the clearing-house and the attorneys employing them?

A. And the sinking fund commissioners.

Q. You mean that that had been agreed on the day before you made your report, on February 14th, 1894?

A. Yes, sir.

Q. You are not the president or secretary of the clearing-house?

A. I am secretary of the committee on taxation.

Q. That is a special committee growing out of this bank-tax matter?

A. Yes, sir; growing out of this bank-tax matter.

Q. Have you had the original record of the clearing-house proceedings before you in comparing these copies to lay?

A. I have not.

Q. Do you know who made those copies?

A. I do not. I presume they were made by the manager.

Q. Who is the manager?

A. Isham Bridges.

Q. Did the title companies of this city existing in 1894 have anything to do with this arrangement you have spoken about?

A. No, sir; not that I know of.

Q. There are now three trust companies in the city of Louisville that were then in existence, the Louisville Trust Co., the

122 Fidelity Trust & Safety Vault Co., and the Columbia Finance & Trust Co. If I understand you, neither of those trust companies was a member of the clearing-house association?

A. They were not members of the clearing-house association in the ordinary sense of clearing through it.

Q. Are they in any sense?

A. They were invited to co-operate and did, and bore their expense of all the costs of litigation in this tax matter.

Q. I understand that; but they were not and are not members of the clearing-house association?

A. They were not members of the clearing-house association.

Q. As to whether or not the members of each of these three classes, which you say the suits that were brought that the banks who brought suit were to represent, were on the same footing you never undertook to investigate; you left that to the attorneys entirely, as to whether they had the same legal standing in court as the banks that did bring suit?

A. It was not part of our business to look into that; but all the banks shared alike exactly in the costs of the litigation, and it was clearly understood that they were to share alike in the benefits that were derived from it.

Q. That agreement was not made with the courts?

A. No; it was made by and between the clearing-house association and the attorneys. We were not at that time dealing with the courts.

Q. A number of these banks had not accepted the Hewitt bill at all; were not in existence at that time. How did you arrange about that?

123 A. We did not make any arrangements whatever about that. They went into this litigation.

The parties hereto, being present by attorney, waive all exceptions except as to competency and relevancy.

JOHN H. LEATHERS.

STATE OF KENTUCKY, }
Jefferson County. }

I, W. C. Furnas, examiner, do certify that the foregoing deposition of John H. Leathers was taken, pursuant to agreement of counsel, before me, and was read to and subscribed by him in my presence at the time and place and in the action mentioned in the caption, the said witness having been first sworn by me that the evidence he should give in the action should be the truth, the whole truth, and nothing but the truth, and his statement reduced to writing by me in his presence, both parties, by attorney, being present. My commission expires Jan. 13, 1900.

Given under my hand this 8th day of July, 1898.

W. C. FURNAS,
Notary Public, Jeff. Co., Ky.

Exhibit J. H. L. #1 of the deposition of John H. Leathers is as follows:

At a meeting of the Louisville Clearing House Association held at the clearing-house on the 30th day of Oct., 1893.

Present: All of the members except the Louisville City national bank, the Farmers' and Drovers' bank, the German national bank, and the German Security bank.

The German national bank and the German Security bank were excused.

124 The president explained that the meeting had been called to consider the question of taxation and such other matters as might be brought before the association.

Mr. Swearingem moved the following resolution, viz:

"Resolved, That it is the sense of this association that in any and all legal contests that may be instituted or arise concerning taxation, whether it be to sustain the chartered rights of the old banks, the contract under the Hewitt law, or on any other lines, the members of this association will act jointly and bear their proportion of the fees and costs incurred, to be calculated and fixed by a uniform assessment on their respective capital, surplus, and deposits.

"Resolved, That Messrs. Jas. P. Helm and Alex. P. Humphrey be employed to represent the interests of this association in such legal proceedings."

Mr. Lindenberger moved to amend by striking out the word "deposits," so as to make the assessment in capital and surplus, and the question being taken, it was decided in the negative. The yeas and nays, being required, were as follows: Those voting in the affirmative were the Merchants' national bank, the Western bank, and the German bank; in the negative, the Bank of Kentucky, the Bank of Louisville, the Bank of Commerce, the Kentucky national bank, the Second national bank, the Citizens' national bank, the Third national bank, the Louisville Banking Co., the Fourth national bank, and the Union national bank.

And so said amendment was lost.

Mr. Russell moved to amend said resolutions by adding
125 thereto the following:

"Resolved, That Messrs. Swearingen, Thos. L. Barret, and H. M. Burford be appointed to carry out the objects of these resolutions."

The question being taken thereon, it was decided in the negative. The ayes and nays, being required, were as follows: Those voting in the affirmative were the Bank of Louisville, the Merchants' national bank, the Citizens' national bank, the Western bank, the Third national bank, and the German bank; in the negative, the Bank of Kentucky, the Bank of Commerce, the Kentucky national bank, the Second national bank, the Louisville Banking Co., the Fourth national bank, and the Union national bank.

And so the said amendment was lost.

The question was then taken on the adoption of the original resolution, and it was decided in the affirmative. The ayes and nays, being required, were as follows: Those voting in the affirmative, the Bank of Kentucky, the Bank of Louisville, the Bank of Commerce, the Merchants' national —, the Kentucky national bank, the Second national bank, the Citizens' national bank, the Western bank, the Third national bank, the German bank, the Louisville Banking Co., the Fourth national bank, and the Union national bank; in the negative, none.

And so the resolutions were adopted.

Mr. Russell moved "that a committee of three be appointed by

the president to carry out and execute the objects of the foregoing resolutions."

Which was adopted, and Messrs. Swearingen, Thos. L. Barret, and Leathers were appointed.

Mr. Leathers moved "that the committee on the Swearingen resolution be requested to communicate to the State banks the action taken by this association and invite their co-operation."

126 Which was adopted.

A true copy.

CLINTON McCLARTY, *Manager.*

Exhibit J. H. L. No. 2 with the deposition of John H. Leathers, is as follows:

Copy.

At a called meeting of the Louisville Clearing House Association held at the clearing-house, on the 2nd day of February, 1894.

Present: All the members except the Farmers' & Drovers' bank, the German Insurance bank, and the German national bank.

Mr. Swearingen, from the committee on taxation, made a verbal report that it was the opinion of the committee that the members of this association should resist by lawful method municipal taxation.

Whereupon Mr. Barret moved the following resolution:

"Resolved, That the committee heretofore appointed at the meeting of Oct. 30th, 1893, be, and are hereby, authorized to determine the matter of resisting the city ordinance providing license taxes and to determine whether each bank shall resist or test cases be made by banks selected by the committee, and also to determine whether any portion of said license tax be paid, or, if any portion, what shall be, and how it shall be paid, and by what banks. In the event the committee make test cases, it is understood that any expense or penalties suffered by any bank making such test cases shall be borne by the clearing-house in the proportion of capital, surplus, and deposits.

This resolution shall be binding on each member of this association when approved by its board of directors, and it is the

127 sense of this association that each member hereof should have its board take action hereon at once and report result to the manager hereof, who shall note the result on his minutes.

Resolved, That a copy of the resolution just adopted by this association giving certain powers to a committee with reference to contesting municipal taxes be sent to each of the trust companies in this city and their concurrence and co-operation be requested, and that they signify to this association within one week from the reception of the resolution aforesaid, but not later than the tenth day of February, 1894, whether or not they will co-operate with the association."

Which was adopted, and then the association adjourned.

CLINTON McCLARTY, *Manager.*

Exhibit J. *L.* H. L. No. 3 of the deposition of John H. Leather, is as follows:

Copy.

At a meeting of the Louisville Clearing House Association held at the clearing-house on the 12th day of February, 1894.

Pr-sent: All the members except the Merchants' national bank, the German national bank, and the Western bank

On motion of Mr. Leathers, John Stites, Esq., the representative of the trust companies of the city, was added to and made a member of the special committee on taxation.

The committee on taxation beg leave to submit the following report:

"We have had several conferences with Messrs. Humphrey
128 & Davie and Helm & Bruce with reference to the probable expense of the banks in the matter of the tax litigation. The committee is confident that the fees of these attorneys will be fair and equitable and satisfactory to the banks. It is a matter of considerable difficulty for the attorneys to make a definite statement at this time as to how many suits may have to be brought or how much litigation may ensue or, from the character of the litigation, how many courts such suits may have to be prosecuted in and through before a decision is finally reached. The committee are able to report to the association that under no circumstances will the expense exceed the sum of $16,000. Of this sum, $1,000 is estimated as the expense of clerk's cost, travelling expenses, printed briefs, etc. The $15,000 for fees is placed at the maximum, not to exceed that sum under any circumstances. The charge for services will be based upon the amount of labor performed, will be finally determined at the end of the litigation, and, while it cannot exceed, may be less than the amount named.

Taking the maximum sum as the basis, the cost of each bank and trust Co., upon the basis of the capital, surplus, and deposit, will be about 40 cents on the $1,000.

We submit herewith a table showing the capital, surplus, and deposits of each of the banks and the trust companies, as furnished by the latest reports of the manager of the clearing-house association, and we give the amount of expense to each institution on the basis of the amount charged at the highest rate.

The services so rendered by the attorneys will include all the legal attention that is required, of whatsoever kind, growing
129 out of this tax question, for every bank in the city of Louisville, with preparation and argument of the cases before the court of appeals and the Supreme Court of the United States, if necessary; and for such services the fees to be charged shall in no event exceed the amount named as the maximum, and with the further understanding that the fees charged shall be based upon the reasonable value of services rendered.

Your committee are further advised to say that if this litigation is placed in its hands it proposes to have regard to that which will be of permanent benefit to the banks, rather than any effort to gain

mere temporary success. It may well be that the present system of taxation proposed by the State and city can be entirely avoided temporarily, but if such a defect were pointed out and urged as a defense the result might well be that the State would by legislation cure this defect, and be led to adopt a system of taxation which is much more onerous than the present one. Your committee will expect, in conducting this litigation upon the part of the banks, to have regard to sound policy and commercial reasons and prospects to a greater extent than to mere questions of law. In other words, it will be the purpose of the committee to secure to the banks what are their rights, but to endeavor, in making the effort to secure them, not to involve the banks in such questions as will lead to their being much more heavily taxed than is at present proposed if the litigation should be unsuccessful.

It will be the purpose of the committee to maintain as friendly and pleasant relations with the taxing power as are possible, and to do nothing to stir up any public sentiment against the banks, and to so nothing that will give any one occasion to say that the
130 banks are making mere technical objections in order to escape their fair proportion of public burdens.

In reposing the power in the committee to conduct this litigation a very large discretion must necessarily be given. The committee will endeavor to use it wisely and to the best interests of all concerned.

Respectfully,
(Signed) GEO. W. SWEARINGEN,
THOS. L. BARRET,
JOHN H. LEATHERS, *Committee.*"

On motion duly made and seconded—

Resolved, That the foregoing report be received and approved.

Which was adopted.

The yeas and nays, being required, were as follows:

Those voting in the affirmative, the Bank of Kentucky, the Bank of Louisville, the Bank of Commerce, the First national bank, the Kentucky national bank, the Second national bank, the Louisville City national bank, the Citizens' national bank, the Farmers' & Drovers' bank, the German Insurance bank, the Third national bank, the German Security bank, the German bank, the Louisville Banking Company, and the Union national bank—total, 15.

Also John Stites, representing the four trust companies.

Voting in the negative, the Fourth national bank—total, 1.

And so said report was received and approved.

The manager was directed to call on the banks not present or represented at this meeting and present the report just adopted and ascertain whether they will concur in the action of the association in reference thereto, and then the association adjourned.

CLINTON McCLARTY,
Sec'ty and Manager.

131 Exhibit J. H. L. #4 with the deposition of John H. Leathers is as follows:

(Copy.)

At a called meeting of the Louisville Clearing House Association held at the clearing-house on the 14th day of February, 1894.

Present: All the members except the German national bank, the Third national bank, and the Fourth national bank.

The minutes of the last meeting were read and approved.

The special committee on taxation presented the following report:

Your committee on taxation would respectfully report that in pursuance of their authority to arrange in reference to testing all of the legal rights of the banks in regard to taxation, and at the same time to prevent any unnecessary friction with the taxing authorities, your committee, in company with the counsel selected by the clearing house, have had a conference with the board of sinking fund commissioners of the city of Louisville. This conference was held upon yesterday afternoon, and we have called this meeting so as to lay before you the result of the joint action of your committee and the sinking fund commissioners. As you are aware, the four per cent. tax on gross earnings prescribed by the ordinance is payable to the sinking fund. It so happens that this year the maturities of the sinking fund are to a very considerable amount in excess of any probable income. You are further aware that the council, in making its levy of ad valorem taxes, omitted the usual levy that is made for the benefit of the sinking fund under the idea that the new
132 licenses which, under the charter, the council had the authority to impose would make up an income to the sinking fund commensurate with the former ad valorem tax. It would be, therefore, a matter of considerable disappointment to the city, as well as to the sinking fund commissioners, should this substituted income to the sinking fund commissioners not be collected; and as the credit of the city is a subject upon which the community is naturally very sensitive, we believe that it is our duty to do everything we can to avoid giving any sort of shock to it.

The proposition that has been formulated by the conference between your committee and the sinking fund is as follows:

All of the banks which are not selected to make the test cases shall pay to the sinking fund 32½ cents on each share of capital stock of the bank. This 32½ cents is the difference between the 42½ cents paid to the State on the first of July and the 75 cents which would have been paid under the Hewitt law. Besides the payment of this 32½ cents to the sinking fund, it is further propored that each of the banks not selected to make the test cases shall lend to the sinking fund commissioners, at four per cent. interest, an amount equal to the difference between the 32½ cents on each share of capital stock and the 4 per cent. on gross receipts. The sinking fund commissioners are to execute to each of the banks making such loan a non-negotiable security, payable if and when it shall be decided that the city had not the right to exact the 4 per cent. on gross receipts from the banks.

The result of this will be that if our litigation turns out favorable

to the banks these obligations will become due to the banks;
133 if it turns out to be unfavorable they will be simply used as a payment by the banks of the tax which is exacted by the ordinance.

It is further proposed that as to the testing banks, viz., those banks that are selected to make the test cases, they shall lend to the sinking fund, upon a similar obligation and at the same rate of interest, the 4 per cent. on their gross receipts, payable in the same way as the other obligations above described.

The reason why the difference is made between the banks that make the test cases and those who do not is that it is thought desirable by our counsel that those banks that make test cases shall not have paid anything at all upon the tax. It is, however, thought desirable that they shall lend the money so as not to disappoint the sinking fund in its present necessities.

If this plan is followed out the sinking fund will have all of the money that it expected to get, and will have had it at a low rate of interest, even though it should turn out hereafter that they had no right to collect any of it.

Your committee, after full conference with their counsel and the sinking fund commissioners, believe that this proposition is a fair one on both sides; that it is as much as the banks can be asked to do, and that the sinking fund has the right, if our litigation is to be a friendly one, to ask that this much be done.

Your committee in this matter have deemed it of the highest importance that this litigation shall be carried on in a way that will show a friendly spirit on the part of the banks, will show that they
134 are not standing upon their rights in any mere technical spirit, and that what they are doing is not with any motive or purpose to embarrass the city or to escape the payment of what is justly due or to make a litigation which is for the purposes of embarrassment or delay; but that the banks are doing everything they can to aid the sinking fund upon the one side and at the same time not sacrifice any of their legal rights upon the other.

We strongly recommend to every bank in the clearing-house that it follow out this arrangement this proposed by the joint action of your committee and the sinking fund commissioners, and to which — is unanimously agreed on both sides.

(Signed) THOS. L. BARRET,
GEO. W. SWEARINGEN,
JOHN H. LEATHERS,
JOHN STITES, *Committee.*"

On motion of Mr. Burford—

Resolved, That the report of the committee be received, approved, and adopted.

And the question being taken thereon, it was decided in the affirmative.

The yeas and nays, being required thereon, were as follows:

Those voting in the affirmative, the Bank of Kentucky, the Bank of Louisville, the Bank of Commerce, Merchants' national bank, First national bank, Kentucky national bank, Second national

bank, Louisville City national bank, Citizens' national bank, Farmers' & Drovers' bank, German Insurance bank, Western bank, German Security bank, German bank, Louisville Banking Company, Union national bank (total, 16), and John Stites, Esq., representing 4 trust companies.

In the negative, none.

135 And so said resolution was received, approved, and adopted.

And then the association adjourned.

CLINTON McCLARTY, *Manager.*

Exhibit J. H. L. # 5 with the deposition of John H. Leathers is as follows:

(Copy.)

At a called meeting of the Louisville Clearing House Association held at the clearing-house on the 17th day of December, 1894.

Present: All members.

Captain Leathers, from the committee of taxation, reported as follows: That it was expedient that all the banks except the Bank of Kentucky, Bank of Louisville, Third national bank, and the Louisville Banking Co. should surrender the notes given them by the sinking fund in 1894, and that all the banks except the Bank of Kentucky and the Bank of Louisville should, for the year 1895, pay the four per cent. license tax without reservation, provided always that the general council shall pass a levy ordinance that does not include in its terms tax on capital stock, surplus of banks and trust companies.

On motion of Mr. Burford, seconded by Mr. Viglini—

It was resolved that the above report be received and adopted. The Bank of Kentucky and Bank of Louisville were excused from voting on account of their position in the suit.

The question being taken thereon, it was decided in the affirmative.

136 The yeas and nays, being required, were as follows:

Bank of Commerce, First national bank, Louisville City national bank, Citizens' national bank, Farmers' & Drovers' bank, German Insurance bank, German national bank, Western bank, Third national bank, German Security bank, German bank, Louisville Banking Co., Union national bank, American national bank—total, 14; nays, none.

And so the said report was received, approved, and adopted, and the meeting adjourned.

ISHAM BRIDGES, *Secretary.*

The exceptions to said depositions of H. S. Barker and J. H. Leathers are as follows:

137 *Exceptions to Complainant's Depositions, Exhibits, Documentary and Record Evidence.*

In the Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

BANK OF COMMERCE, Complainant,
versus
SAMUEL H. STONE, &c., Defendants. } # 6567.

The defendant City of Louisville excepts to the depositions, exhibits, documentary and record evidence offered and read in evidence by complainant on the final hearing of this cause as follows:

1. Questions Nos. 6, 7, 8, 9, 10, 11, 12, 13, 19, 20, 24, and 25 of the main examination in the deposition of H. S. Barker call for incompetent and irrelevant testimony, and the answers thereto are incompetent and irrelevant testimony against this defendant.

2. The two exhibits filed with said Barker's deposition, marked Exhibit "Copy" and Exhibit "A," are incompetent and irrelevant evidence against this defendant.

3. The answers to questions Nos. 75, 76, and 82 of the cross-examination in the deposition of said Barker are not responsive to the questions asked, and, so far as they detail or refer to conversations or matters not shown by the proceedings of the commissioners of the sinking fund of record on their journal or minute book, said answers are incompetent and irrelevant testimony against this defendant.

4. The third paragraph of the answer of the commissioners of the sinking fund in the suit of The German Security Bank against said commissioners, copied into the deposition of said Barker on his own motion, is incompetent and irrelevant testimony against this defendant.

5. Questions Nos. 3, 4, 5, 6, 7, 9, 10, 11, 13, 14, 15, 16, 17, 18, 24, 25, and 26 of the main examination in the deposition of
138 J. H. Leathers call for incompetent and irrelevant testimony against this defendant.

6. Exhibits 1, 2, 3, 4, and 5, made part of said Leathers' deposition, are incompetent and irrelevant testimony against this defendant.

7. The record in the suit of The Louisville Banking Company against R. H. Thompson, judge of the police court of Louisville, is incompetent and irrelevant evidence against this defendant.

HENRY L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

And on the 14th day of July, 1898, the following order was entered:

This cause having come on to be heard for final decree, the parties filed stipulations Nos. 1 and 2 and complainant read, 1st, its bill of complaint; 2nd, the record of the proceedings in the case of The Louisville Banking Company *vs.* R. H. Thompson, judge, &c., lately

pending in the Jefferson court of common pleas and in the court of appeals of Kentucky, being an exhibit to the bill of com-
139 plaint in the case of The Louisville Banking Company *vs.* Samuel H. Stone, &c., lately pending in this court.

3rd, stipulation No. 1 between the complainant and the defendants; 4th, deposition of Henry S. Barker, taken herein, with the exhibits thereto attached; 5th, the deposition of John H. Leathers, taken herein, with the exhibits thereto attached.

The defendant The City of Louisville read on the hearing, 1st, its answer; 2nd, stipulation No. 2 between the complainant and defendants, with documents therein referred to; 3rd, deposition of J. Moss Terry, taken herein, and the exhibits thereto attached, and, the court being now advised, it is adjudged, ordered, and decreed as follows:

1. That the complainant is entitled to the benefit of the proceedings taken in the case of The Louisville Banking Company *vs.* R. H. Thompson, judge, &c., in the Jefferson court of common pleas, and the proceedings taken in said cause on appeal to the court of appeals of Kentucky, wherein The Louisville Banking Company was appellant and the said R. H. Thompson, judge, &c., and The City of Louisville were appellees, to the same extent as if the complainant had been a party to said proceedings.

2. That it is *res adjuducata* between the complainant and the city of Louisville that the complainant is entitled to be taxed under what is known as the Hewitt revenue law and not otherwise, and it is therefore adjudged, ordered, and decreed that the defendants Samuel H. Stone, Charles Finley, and George W. Long are perpetually enjoined and restrained from making any assessment under the act of November 11th, 1892, or certifying the same to the
140 city of Louisville upon any rights, properties or franchises, or shares of stock of the complainant, and that any provisions of the constitution of the State of Kentucky and any provision of the said act of November 11th, 1892, or of the city charter which may be construed as authorizing the levy or assessment of any tax against the complainant, its rights, properties, or franchises, other than as allowed by the said Hewitt law is, during the corporate existence of the complainant, unconstitutional and void, and that the complainant and its shares of stock are exempt from all other taxation whatsoever, except as prescribed in the said Hewitt law, so long as said tax shall be paid during the corporate existence of complainant.

3. That the complainant do recover of the defendants its costs herein expended. The defendants now in open court pray an appeal from this decree to the Supreme Court of the United States, which is allowed. The complainant waives citation upon said appeal in open court.

The defendants filed herein their assignment of error, and it is ordered that said appeal may be perfected by the execution of a bond by the defendants, with surety, to be approved by the clerk, in the penalty of one thousand dollars.

Stipulations Nos. 1, 2, and 3 are as follows:

141 *Stipulation No. 1.*

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

BANK OF COMMERCE, Complainant,
vs.
SAMUEL H. STONE, &c., Defendants. } 6567.

It is agreed between the complainant and the defendants herein as follows:

1st. That the complainant complied with the revenue act of May 17th, 1886, known as the Hewitt law, in the manner and within the time provided for in said law, and that said agreement upon the part of complainant was within proper time certified by the proper officer of the bank to the governor of the State of Kentucky.

2nd. That the complainant may read on the hearing the record of the proceedings in the case of The Louisville Banking Company *vs.* R. H. Thompson, judge of the police court of the city of Louisville, in the Jefferson court of common pleas, and the same case on appeal in the court of appeals of Kentucky, Louisville Banking Company, appellant, *vs.* City of Louisville and R. H. Thompson, appellees, the same being filed in a case pending in this court styled "Louisville Banking Company *vs.* Samuel H. Stone and others."

HELM & BRUCE,
For Complainant.
H. L. STONE,
City Attorney.

Stipulation No. 2 is as follows:

142 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF COMMERCE, Complainant,
versus
SAMUEL H. STONE, &c., Defendants. } Stipulation No. 2.

I. It is stipulated and agreed between the complainant and the defendant City of Louisville that the following ordinances of the said city shall be read as evidence in its behalf on the trial of this action, and the same are made part of the record as though copied and fully set out in this stipulation, to wit:

1. An ordinance entitled "An ordinance concerning the taxes for the fiscal year ending August 31, 1893," approved December 17, 1892 (Second Biennial Compilation of the Ordinances of the City of Louisville, 1897, pp. 248–250).

2. An ordinance entitled "An ordinance relating to assessments," approved August 9, 1893 (*ib.*, pp. 219–222).

3. An ordinance entitled "An ordinance concerning the taxes for the fiscal year ending August 31, 1894," approved December 21, 1893 (*ib.*, pp. 250–252).

4. An ordinance entitled "An ordinance concerning certain licenses in the city of Louisville," approved January 29, 1894, being the same ordinance, referred to in complainant's bill, requiring banks to pay to the sinking fund of the city of Louisville an annual license of four per cent. (4 %) on their gross earnings, a copy of which ordinance is hereto attached, marked Exhibit "L."

143 5. An ordinance entitled "An ordinance concerning the taxes for the fiscal year ending August 31, 1895," approved December 22, 1894 (*ib.*, pp. 256, 257).

6. An ordinance entitled "An ordinance providing for the retrospective assessment of omitted personal property," approved July 9, 1895 (*ib.*, pp. 204, 205).

7. An ordinance entitled "An ordinance provising for cerditing as volorem tax bills on personalty by the amount paid to the sinking fund as license on same," approved August 6, 1895 (*ib.*, 205 206).

8. An ordinance entitled "An ordinance concerning taxes for the fiscal year ending August 31, 1894, on all property omitted from am ordinance entitled 'An ordinance concerning the taxes for the fiscal year ending August 31, 1894,' approved December 21, 1893," approved April 9, 1897 (*ib.*, 252–256).

9. An ordinance entitled "An ordinance regulating the duties of the city assessor with respect to tax bills on assessments made by the State railroad commission and the State board of valuation and assessment," approved April 9, 1897 (*ib.*, 28, 29).

The ordinances above referred to are to be read subject to legal exceptions for competency and relevancy.

II. It is further stipulated and agreed that the "commissioners of the sinking fund of the city of Louisville" were incorporated and organized, and their powers and duties are prescribed and defined by the statutes and ordinances compiled and embraced in chapter XLIII, sections 1 to 49, inclusive, Burnett's Louisville City

144 Code, 1884, pp. 691–705, which ordinances and special statutes are made part of the record as though copied and fully set out in this stipulation, and by sections 3010 to 3024, Kentucky Statutes, edition of 1894.

III. It is further stipulated and agreed that the meeting of the next General Assembly after the passage of the Hewitt act, on May 17, 1886, was required by statute at the latter date to be, and was in fact, on Friday, December 30, 1887.

IV. That the complainant's franchise was prior to the institution of this action assessed by the State board of valuation and assessment under the act of November 11, 1892, for the year 1893 at $1,320,683, and for the year 1894 at $1,406,713; that these assessments were certified by the State auditor to the clerk of the Jefferson county court and by the latter to the collecting officer of the defendant City of Louisville for collection, and that the assessor, under the ad valorem tax levy ordinances of the defendant city, has since April 12, 1897, made out on said respective assessments and listed with the tax receiver for collection against the complainant a tax

bill for the year 1893, at the rate of 74½ cents on each $100, for $26,446.20, both of which tax bills remain unpaid.

V. It is agreed by counsel for complainant and defendant herein that the corporate existence which complainant had when it accepted the provisions of the Hewitt act expires, by then existing statute, on 10th day of February, 1910.

HELM & BRUCE,
Solicitors for Complainant.
H. L. STONE,
City Attorney, Solicitor for Defendant
City of Louisville.

145 Stipulation No. 3 is as follows:

Circuit Court of the United States for the Sixth Circuit and District of Kentucky.

BANK OF COMMERCE, Complainant,
vs.
S. H. STONE, &c., Defendants.
} #6567. Stipulation No. 3.

It is agreed between the parties complainant and defendant herein that in copying this record for the Supreme Court of the United States the clerk may omit all such parts of the record as are contained in the copy made for the Supreme Court of the record in the case of The Louisville Banking Company *vs.* Samuel H. Stone, &c. Each party is to be at liberty to refer to those records for the depositions and documents in exactly the same way as if they were contained in this record.

HELM & BRUCE,
For Complainant.
L. H. STONE, *City Att'y.*

Petition and assignment of errors is as follows:

146 In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF COMMERCE, Complainant,
versus
SAMUEL H. STONE, &c., Defendants.
} #6567. Petition and Assignment of Errors of the City of Louisville and Board of Valuation and Assessment.

To the honorable the judges of the United States circuit court for the sixth circuit, district of Kentucky:

Now comes the petitioners and defendants, City of Louisville and Samuel H. Stone, auditor; George W. Long, treasurer, and Charles Finley, secretary of state, constituting the board of valuation and assessment, and state that the record, proceedings, and decree of the court rendered herein July 14, 1898, contain manifest errors to their prejudice committed, as follows, to wit:

I.

The court erred in overruling and not sustaining each ground of their respective demurrers to complainant's bill, and in entertaining jurisdiction of this action, and in not decreeing a dismissal of complainant's bill, because it does not contain any matter of equity whereon this court can ground any decree or give to complainant any relief against these defendants or either of them.

II.

The court erred in overruling the exceptions of the defendant City of Louisville to the depositions, exhibits, documents, and records offered and read in evidence by complainant on the final hearing of this cause.

III.

147 The court er-ed in decreeing that complainant has an irrevocable or *irreparable* contract during its corporate existence with the State of Kentucky to pay taxes only in accordance with the Hewitt act of May 17, 1886, by reason of its acceptance of the provisions of said act and the former judgment in the action of the Louisville Banking Company against R. H. Thompson, judge of the police court of the city of Louisville, in the Jefferson circuit court, common pleas division, April 13, 1897, in pursuance of the mandate of the court of appeals of Kentucky, by which judgment further proceedings were prohibited in the prosecution of the warrant issued against said Louisville Banking Company in said police court for carrying on the business of banking without paying the license fee to the sinking fund commissioners of the city of Louisville, in violation of the ordinance of the city of Louisville of January 29, 1894, passed in pursuance of the act of July 1, 1893, for the government of cities of the first class, and in decreeing that the claims and rights of the defendant City of Louisville to ad valorem taxes on the assessments of complainant's franchise or intangible property, made or required to be made by the defendants, who constitute the board of valuation and assessment of the State of Kentucky, under the act of November 11, 1892, on account of the alleged agreement with Ex-City Attorney Barker and the commissioners of the sinking fund of the city of Louisville, were by the judgment aforesaid *res judicata*, and in decreeing a perpetual injunction against the defendant members of said State board, enjoining and restraining them from valuing and assessing the franchise of intangible property of complainant, and from certifying such assessments for State and municipal taxation for the
148 years 1895, 1896, 1897, and 1898 and during the corporate existence of the complainant, as required of said State board by said act of November 11, 1892, and in decreeing that the latter act, the city charter and the State constitution, or either of them, impaired the obligation of said alleged contract between complainant and the State of Kentucky, and thereby violated and was repugnant to the Constitution of the United States.

Wherefore these petitioners and defendants say the said decree of the court herein is erroneous, and pray this honorable court to grant them an appeal to the Supreme Court of the United States, to the end that said decree may be reversed, and that said errors may be corrected; and so they will ever pray.

H. L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.
W. S. TAYLOR,
Attorney General, Solicitor for Defendants Constituting the Board of Valuation and Assessment.

149 Bond above referred to is as follows:

Circuit Court of the United States, District of Kentucky.

BANK OF COMMERCE,
vs.
SAMUEL H. STONE ET AL.

Know all men by these presents that we, Samuel H. Stone, Charles Finley, G. W. Long, City of Louisville, & The Fidelity & Deposit Company of Maryland, are held and firmly bound unto the Bank of Commerce in the sum of one thousand dollars, to be paid to the said Bank of Commerce, executors or administrators; to which payment, well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our heirs, executors, and administrators, firmly by these presents.

Sealed with our seals and dated this 16th day of July, A. D. 1898.

Whereas the above-named Samuel H. Stone, Charles Finley, G. W. Long, & the City of Louisville hath prosecuted an appeal to the Supreme Court of the United States to reverse the decree rendered in the above-entitled suit by the circuit court of the United States for the district of Kentucky, at Louisville:

Now, therefore, the condition of this obligation is such that if the above-named Samuel H. Stone, Charles Finley, G. W. Long, & the City of Louisville shall prosecute their said appeal to effect and answer all costs if they shall fail to make good their plea, then this obligation shall be void; otherwise the same shall be and remain in full force and virtue.

CITY OF LOUISVILLE, [L. S.]
By H. L. STONE, *City Attorney.* [L. S.]
FIDELITY & DEPOSIT CO. OF MARYLAND,
By WILLIS S. MULLEN, [SEAL.]
Gen'l Ag't & Att'y-in-fact.

Sealed and delivered in presence of—
HENRY F. CASSIN,
Deputy Clerk U. S. Circuit Court.

150 Agreement for record on appeal to Supreme Court is as follows:

In the Circuit Court of the United States for the Sixth Circuit, District of Kentucky.

BANK OF COMMERCE, Complainant,
vs.
S. H. STONE, &c., Defendants. } # 6567.

Agreement for Record on Appeal to Supreme Court.

In order to prevent unnecessary expense and the making of the record larger than is useful, the complainant and defendants have agreed as follows:

In copying the record in this case on appeal to the Supreme Court of the United States, the clerk may omit (1) the opinion and dissenting opinion in the bank-tax cases, decided June 1, 1895, (see opinion, 97 Ky., 590); (2) the clerk need not copy the special acts relating to the sinking fund commissioners of the city of Louisville nor the ordinances recited in stipulation No. 2 filed herein, but counsel may print such parts of said acts and ordinances as seem to him relevant in an appendix to his brief.

HELM & BRUCE,
Solicitors for Complainant.
HENRY L. STONE,
City Attorney, Solicitor for Defendant City of Louisville.

151 DISTRICT OF KENTUCKY, *ss:*

I, Thomas Speed, clerk of the circuit court of the United States for the district of Kentucky, at Louisville, do hereby certify that the foregoing 150 pages contain a true and correct transcript of the record in the case mentioned in the caption hereof, in accordance with the stipulation of counsel herein, as the same appears from the files and records in my said office.

Witness my hand and the seal of said circuit court this 4th day of August, A. D. 1898.

[Seal 6th Circuit Court, Ky. Dis., U. S. of America.]

THOS. SPEED, *Clerk.*

Endorsed on cover: Case No. 16,947. Kentucky C. C. U. S. Term No., 362. Samuel H. Stone, auditor; Charles Finley, secretary of state, and George W. Long, treasurer, of the Commonwealth of Kentucky, and City of Louisville, appellants, *vs.* The Bank of Commerce. Filed August 15th, 1898.